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Task Force on **Labour Relations**

Study No. 18

Interest Arbitration

Donald J. M. Brown,
LL.B. (Osgoode)
LL.M. (Harvard)

Osgoode Hall Law School
York University

Privy Council Office
Ottawa

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TASK FORCE ON LABOUR RELATIONS
(under the Privy Council Office)

STUDY NO. 18

INTEREST ARBITRATION

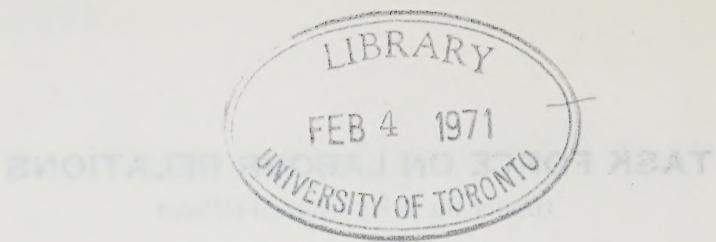
BY

DONALD J. M. BROWN
LL.B. (Osgoode)
LL.M. (Harvard)

Osgoode Hall Law School
YORK UNIVERSITY

OTTAWA

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CHAPTER I

A THEORETICAL ANALYSIS

INTRODUCTION

This chapter attempts to establish a framework for examining the operation of "interest arbitration" processes within several industrial relations systems. Following a summation of Dunlop's model of "industrial relations systems" 1/ "interest arbitration" is analyzed from two perspectives. The first is directed to discovering the essential features of the process and to an evaluation of its workability as a method of decision. In this regard Professor Fuller's conceptualization of "adjudication" and its limitations 2/ as a method of social ordering provide the central focus. The second perspective is concerned with "interest arbitration" as a terminal variant of collective bargaining negotiations. Following a summary identification of the essential variables in collective bargaining negotiations some hypotheses as to the effect of various forms of "interest arbitration" on collective bargaining negotiations will be made. Much of this latter analysis is drawn from Professor Stevens's writings — "Strategy and Collective Bargaining Negotiations" 3/ and "Is Compulsory Arbitration Compatible With Bargaining?" 4/

DUNLOP'S MODEL OF INDUSTRIAL RELATIONS SYSTEMS

Dunlop's general concept of an industrial relations system is that at any one point of time it is comprised of certain actors, certain contexts, an ideology which binds it together, and a body of rules created to govern the actors. Generally speaking the actors are (1) management, (2) workers and their organizations and spokesmen, and (3) governmental agencies (and specialized private agencies created by the first two actors) concerned with workers and their relationships. Dunlop postulates that these actors interact within an environment determined by the larger society, and he groups the significant environmental factors as (1) the technological characteristics of the work place and work community, (2) the market or budgetary restraints impinging on the actors, and (3) the power structure of the larger society. One final variable to be explained in an analysis of an industrial relations system at one point of time is the "ideology" of the system, that is, the body of common ideas that defines the role and place of each actor in the system and defines the ideas each actor holds toward the place and function of the others in the system. 5/

The actors operate within a web or network of rules governing the work place. These rules, both procedural and substantive, and their formation and administration are the central focus of an industrial relations system. "Just as the satisfaction of wants through the production and exchange of goods and services is the locus of analysis in the economic sub-system of society, so the establishment and administration of these rules is the major concern or output of the industrial relations sub-system of industrial society." 6/

In this study the particular focus is on arbitration as a process of rule-making, more precisely as a process of establishing the main rules regulating the relationships of workers and management in particular work places for future periods of time. It is a process in which all three actors play a consequential role in rule setting. 7/

To see the systems in the perspective of their development is of particular importance in evaluating the arbitration experience of other industrial relations systems. For, as Dunlop notes, the major characteristics of a national industrial relations system are generally established at an early stage in the development of a country. The economic, political and industrial "revolutions" in a country relative to the rise of the labour movement and the broad strategy of the elite directing the industrialization program of a country are important variables. 8/

In examining the processes of "interest arbitration" in Singapore and in Australia the respective systems of industrial relations will be briefly stated particularly when they appear to materially affect the working of the "interest arbitration" process. In this regard Dunlop's several groupings of variables and factors including the technological and market contexts, the status of the actors, the ideology of the system, its historical formative stages, the sequence of national, political and industrial revolutions, the level of economic development, and the characteristics and objectives of the governing elites will form the framework of analysis. The main enquiry undertaken herein, however, focuses on (1) the internal dynamics of "interest arbitration" as a rule-setting or decision-making process and (2) its effect on antecedent collective bargaining. For that reason the industrial relations systems in which the process is operating will be somewhat de-emphasized and summarily treated.

INTEREST ARBITRATION AS A PROCESS OF DECISION

1. Some General Concepts

(a) Dunlop's Categorization

Rule-formulation and administration can be carried out in a variety of ways which Dunlop classifies into five ideal types: (1) where the managerial hierarchy may have a relatively free hand uninhibited generally from intervention by workers or governmental agencies; (2) where specialized governmental agencies play the dominant role without substantial participation by management or workers; (3) where the worker hierarchy has a relatively free hand; (4) where management and workers together establish the rules without any significant participation by governmental agencies; and (5) where all three actors, management, workers, and either a governmental agency or a privately established specialized agency all play a consequential role in formation and administration of the rules governing the work place. 9/

The role of governmental agencies can be relatively inconsequential as, for example, the National Labor Relations Board in its rather limited function of enforcing the prescription that the parties "bargain in good faith"10/ or it can be virtually the only actor playing a consequential role. "Interest arbitration" is viewed here as a process where all three actors play a "consequential role" in the setting of rules to govern a work place. The central enquiry of this report will be to examine the relative sharing of the decision power; more precisely, the degree of meaningful participation in the decision process afforded to the affected parties — workers and management.

(b) Compulsory Arbitration

Arbitration of disputes over the terms and conditions that make up the code of rules governing a collective employee-employer relationship can be voluntary or compulsory in varying degrees. If no agreement is reached the parties can be required by law to refer their dispute to arbitration and be compelled to accept the arbitral decision as binding. Or, on the other hand, legislation can be so designed that the institution of arbitration must be by agreement but, once instituted, the arbitral decision is binding. A third variation is one in which a party can voluntarily institute arbitration but in so doing compel the other to join in the process and to accept the arbitral decision as binding.

This enquiry, however, makes little distinction between voluntary and compulsory arbitration in any of its possible forms in the belief that the element of compulsion does not significantly affect the process of arbitration as a type of decision-making. The importance of the character of compulsion attached to arbitration would seem to be not with the dynamics of decision but rather with the acceptability of arbitral decisions and this will be considered further from that standpoint. 11/

(c) The "Essence" of Interest Arbitration

"Interest arbitration" is distinctive only in that a third party is fundamentally or ultimately responsible for the formulation of the rules governing the worker-management relationship for a future period of time. There may or may not exist "criteria of decision". The "third party" may be an individual or a number of persons. The disputants or affected parties may or may not play significant roles in the decision-making process. And,

the process may be wholly voluntary or it may be required or compelled in varying degrees. The one constant feature in the process is that a third party is ultimately responsible for determining the rules to govern a worker-management relationship. It is a process whereby a third party is ultimately responsible for doing the same job commonly done by collective bargaining in North America.

(d) "Interest Arbitration" and "Rights Arbitration"

The general distinction between "interest arbitration" and the more familiar North American form of labour arbitration — "Rights arbitration" — is that the primary function of the former is the formulation of the rules to govern the employee-employer relationship whereas the primary function of "rights arbitration" is to settle disputes by the application of rules or other criteria of decision. 12/

This general characterization is of little analytical value, however, for determining the appropriateness of arbitration for either task. Law formulation and law application are at best merely polar concepts for in the application of rules there is often an element of "law formulation" and correspondingly it is possible to visualize a decision maker charged with the function of "law formulation" with so little discretion that it is difficult to find any creativity in the decision function at all.

In a "rights arbitration" the arbitrator is required to go through a three-step decision process. Firstly, he must articulate the rule or rules, principles, or other criterion or criteria of decision governing the dispute. Then he will be required to identify the facts or happenings that form the basis of the dispute. Finally, he will have to apply the governing

criterion or criteria — the law — to the facts and make a final determination — a statement of the rights and liabilities — of the dispute. 13/ In many cases, however, a type of "law formulation" will be necessary for resolution of the dispute. Three examples will assist:

1. Suppose a collective agreement provides that "each fitter shall be paid \$2.00 per hour". A, a fitter worked 24 hours one week but was paid only \$40.00. A claims \$8.00 and the dispute goes to arbitration. In this situation the arbitrator will declare the governing rule to be "each fitter shall be paid \$2.00 per hour". This could hardly be said to involve any "law formulation".
2. Suppose a collective agreement provides that "there shall be no discharge without just cause". A, an employee, disobeys his foreman's instructions and is discharged. He grieves and the dispute goes to arbitration. Should the arbitrator articulate the basis of his reasoning he will have to state whether or not disobedience of a superior is "just cause" for discharge. This development of the standard "just cause" can be seen as an instance of "law formulation".
3. Suppose a collective agreement is silent on the question of sub-contracting. The employer sub-contracts the plant maintenance work and "lays off" a janitor. He grieves and the dispute goes to arbitration. If the arbitrator should declare that "sub-contracting was permissible if done in good faith" this could be pointed to as "law formulation".14/

As the last two examples indicate, "rights arbitration" can involve an element of law formulation. And further, if the decisions in the hypothetical cases were regarded as binding by future arbitrators, law in another sense would have been formed. 15/

By way of rejoinder, however, objection to this analysis might be taken on the grounds that "interest arbitration" has as its main purpose "rule formulation" whereas in "rights arbitration" the law or "rule formulation" involved is really just an elaboration of existing criteria of decision and arises only, albeit necessarily, as a by-product of the determination of the dispute. 16/ Granting that this is so, the distinction can nevertheless become ephemeral. One can imagine a statute that predicates the institution of interest arbitration on the existence of a dispute between labour and management, that provides "criteria of decision"; that directs the arbitrator to determine the factual basis of the dispute and apply the criteria to it, concluding with a final and binding determination. In such a situation it is difficult to say whether any "law formulation" that might be undertaken is the main result of the process or merely a necessary by-product.

In any event, the use of "law formulation" and "law application" as analytical tools is of very little value. Neither focuses on the process of decision in interest arbitration, particularly the role played by the affected parties. Nor does the dichotomy lead to a consideration of the limits of third party decision processes. Furthermore, the above analysis leaves unanswered the question of whether criteria of decision can always be devised to function as such in settling all types of disputes. A more fruitful line of enquiry is found in Professor Fuller's "The Forms and Limits of Adjudication". 17/

2. Professor Fuller's Adjudication Model

(a) The "Essence" of Adjudication

Professor Fuller's concept of "true adjudication" derives from one proposition, namely, that "the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favour".^{18/} He goes on to state that "whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself. Thus, participation through reasoned argument loses its meaning if the arbiter of the dispute is inaccessible to reason because he has been bribed and is hopelessly prejudiced".^{19/} This distinguishing feature of adjudication as a form of social ordering — that it confers on the affected parties a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments to the adjudicator for a decision in their favour — gives rise to several implications:

1. It is a device that gives formal and institutional expression to the influence of reasoned argument; and reasoned argument means that decisions must be arrived at or explained by logical or analogical development of given or stated premises.^{20/}
2. As such it converts the questions or issues submitted for decision into claims of right or accusations of fault. The conversion is effected by the institutional framework. As part of the process the affected parties have the opportunity of presenting proofs and reasoned arguments. The participant therefore, if his participation is to be meaningful, must assert some principle or principles to which his proofs can be related and upon

which his argument can be premised. A claim of right is distinguished from a naked demand by the fact that a claim of right is supported by principle. Accordingly, because of the manner of participation afforded the affected parties, the issues tried before a decision-maker acting as an adjudicator tend to become turned into claims of right or accusations of fault. 21/

3. Obviously, therefore, for adjudications to be meaningful there must exist "principles" or "criteria of decision" common to the dispute and capable of being rationally elaborated and applied in making the decision and of a sufficient character and quality for proofs to be made relevant and to which argument can be rationally related.

In addition to these observations many of the customary characteristics of the judicial process, the most familiar illustration of adjudication in operation can be explained. The system of adversaries is appropriate because it assures to the affected parties an effective procedure for participation by way of presenting relevant proofs and rational argument. 22/ The requirement that the decision-process not be instituted by the judge but rather that it be left to the initiative of the parties affected assures that the judge will not develop pre-conceptions without the parties having had the opportunity to present their proofs and make their argument. The custom of requiring written reasons enables the parties to confirm their participation in the decision and thereby enhances its acceptability. Finally, the custom that no judicial decision be made on the basis of hypotheticals but rather that it be grounded in an actual dispute becomes clearer. In the first place it defines the parties affected, thus enhancing

participation. Secondly, it sharpens the issues for decision, thereby giving the affected parties notice of the proofs that must be presented and of the principles to which their argument should relate.

The foregoing analysis in itself, however, does not answer the question of whether a form of adjudication is appropriate for determining disputes over "interests"—disputes over the terms and conditions to regulate a particular employer-employee relationship. It can still be argued that if disputes over "interests" were subjected to a third-party decision process, criteria of decision established, and the parties to the dispute given the opportunity to present proofs and reasoned argument that "adjudication" would be an appropriate process of decision for resolution of the dispute. Criteria of decision can always be provided. But are all disputes or problems of such a nature that criteria can be provided that will be capable of rational application to the dispute or matter in issue? The question thus becomes which tasks are and which tasks are not suited for decision by adjudication: or which problems or disputes, if any, cannot be subjected to the governance of rules rationally applied to resolve them.

(b) Polycentric Problems

By "polycentric" problems or tasks Professor Fuller means those involving a complex of inter-related sub-issues so connected that decision on one issue necessarily affects and bears upon the subsequent disposition of the others. To illustrate the concept he analogizes to a spider web:

We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions, but will rather create

a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many-centred" each crossing of strands is a distinct centre for distributing tensions. 23/

He further illustrates by referring to the problem of assigning positions on a football team:

Suppose again it were decided to assign the players on a football team to their positions by a process of adjudication. I assume that we would agree that this would be an unwise application of adjudication. It is not merely a matter of eleven different men being possibly affected, but that each shift of any one player might have a different set of repercussions on the remaining players; putting Jones in at quarterback would have one set of carry-over effects, putting him in at left end another. Here, again, we are dealing with a situation of interacting points of influence and therefore with a polycentric problem beyond the proper limits of adjudication. 24/

In another illustration he indicates that it is the nature of the problem and not the number of affected parties that creates the polycentricity:

Returning now to a more general analysis of polycentric problems, it will be recalled that I have asserted that the gist of the distinction does not lie in a mere multiplicity of parties. One can imagine a controversy with strong polycentric features arising between two parties. A wealthy farmer leaves his estate to be divided "equally" between his two sons, without ordering any particular apportionment. The estate consists of a great variety of properties, most of which have no clearly ascertainable market value. These properties, and the sons' divergent interests in them, are complexly inter-related. There is a collection of guns of all kinds and a rifle range. One son is mildly interested in target shooting, another is a shotgun enthusiast. There is a conservatory of plants and a library that contains a special collection of books on tropical flowers. One son is a gardener, the other a bookworm, etc.

Though there are only two parties involved, dividing this estate "equally" would present a polycentric problem because the possible divisions of the estate are limitless. It is not like a suit on an alleged debt of \$100, where the answer is either "yes" or "no". Any arbitrator called in to adjudicate between the sons would soon find himself drifting into the role of mediator. It would be impossible to hold a series of

formal hearings, each directed toward a different possible division of the estate. The arbitrator might preserve something of the integrity of his role, however, by holding extended discussions with the sons and then issuing a tentative decree with each side being ordered to show cause why it should not become final. (I assume the reader is familiar with the classical solution for this puzzler; let the older son divide the estate into two parts, let the younger son take his pick.) 25/

This conceptualization, however, is not one of absolutes. Problems do not divide neatly into categories of "polycentric" and "non-polycentric". In all situations it is a matter of degree. In this regard Professor Fuller has this to say:

Now if it is important to see clearly what a polycentric problem is, it is equally important to realize that the distinction involved is often a matter of degree. There are polycentric elements in almost all problems submitted to adjudication. A decision may act as a precedent, often as an awkward one, in some situations not at all foreseen by the arbiter. Again, suppose a court in a suit between one litigant and a railway holds that it is an act of negligence for the railway not to construct an underpass at a particular crossing. There may be nothing to distinguish this crossing from other crossings on the line. As a matter of statistical probability it may be clear that constructing underpasses along the whole line would cost more lives (through accidents in blasting, for example) than would be lost if the only safety measures were the familiar "Stop, Look & Listen" sign. If so, then what seems to be a decision simply declaring the rights and duties of two parties is in fact an inept solution for a polycentric problem some elements of which cannot be brought before the court in a simple suit by one injured party against a defendant railway. In lesser measure concealed polycentric elements are probably present in almost all problems resolved by adjudication. It is not then a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached. 26/

The significance of this analysis is simply that any enquiry into the suitability of adjudication as a process of decision should focus on the element of polycentricity inherent in the type of problem to be resolved. The hallmark of adjudication is that it gives formal and institutional expression to reasoned argument in the resolution of problems or disputes.

The characteristics of "a number of sub-issues" and their "inherent inter-relatedness" militate against its successful utilization. The multiplicity of possible combinations and permutations created by the polycentricity will tend to render any attempt to select one as "right" and support it with reasoned argument difficult if not impossible. By way of analogy, an attempt to resolve polycentric problems through reasoned argument would be much the same as attempting to solve complex calculus problems with simple arithmetical tools.

Another significant implication relates to "criteria of decision". It follows from the foregoing that if a problem is so inherently polycentric that any attempt to resolve it by reasoned argument would be futile, then no criteria of decision could possibly operate effectively. Moreover, Professor Fuller would argue that any attempt to devise workable criteria of decision would come to nought. He elaborates as follows:

A right is a demand founded on a principle—a principle regarded as appropriately controlling the relations of two parties. Now it is characteristic of a polycentric relationship that the relations of the individual members to one another are not controlled by principle peculiar to those relations. There are principles of bridge building; there are no principles that govern the proper relations of any single girder to another—that depends on the structure as a whole... 27/

(c) Criteria of Decision

Where the polycentricity is not overwhelming or where it can be effectively disregarded, however, the question of "criteria of decision" is important. "By its nature adjudication must act through openly declared rule or principle and the grounds on which it acts must display some continuity through time...." 28/ Thus, the development of rules, standards, or principles sufficient to satisfy these desiderata must be considered.

(i) Multiplicity of Criteria - One first obvious point in this regard is that if there are several separate and conflicting criteria then the result will likely be no better than if there were none at all. The parties will be unable to determine the governing one and their participation will be correspondingly diminished. If the criteria lead to conflicting conclusions their argument will be frustrated and illusory.

(ii) Quality of Criteria - Any rules, standards or principles intended to operate in adjudication decision making must have sufficient clarity or firmness to be capable of rational application to particular disputes. They must have clear dimensions and be capable of consistent measurement. If they are vague and latently incapable of consistent application they will be nothing more than what Friedman terms "spurious Rules". 29/ To operate in any meaningful way the criteria of decision must not be purposeless. That is, they must be more than a statement that some decision is better than none at all. For example, a directive to an adjudicator to base his decisions on the principle of "insuring industrial peace" will afford no guide to the affected parties nor to the adjudicator and really would be nothing more than a "spurious rule". To be effective the criteria should clearly relate to a general purpose.

(iii) Parasitic Criteria of Decision 30/ - Parasitic criteria of decision are criteria that derive their sustenance from another ordering process. For example, in land expropriation, if a third party is told to settle disputes and base his decision on "current market value" this criterion would be parasitic on a regime of contract or exchange. As such it would have the potential of devouring the very basis of its operation — the market. Thus, in developing criteria, care must be taken not to use parasitic criteria where a real danger exists that in time the adjudicative

process would undermine its own foundation. For example, this could happen if an arbitration system were devised to set prices or wages for a total market and if the criteria to be utilized were "market rates". In time the arbitration would of necessity displace the market. Of course, if the system did not reach to the whole market apparatus or to a substantial portion of it then there would be less danger in basing the decision process on some such "parasitic" standard.

(d) Summary

(1) Adjudication as a process of decision is characterized by the mode of participation afforded to the parties affected by the decision. The mode of participation afforded is through the presentation of relevant proofs and reasoned argument.

(2) To be meaningful participation, the affected parties must be able to assert some principles or other criteria of decision upon which their arguments can be premised and to which their proofs can be related.

(3) Problems characterized as inherently containing a number of inter-related sub-issues thus creating a multiplicity of possible combinations extend beyond human ability to rationally trace out all of the implications and relationships through to a "right" or "wrong" answer.

(4) The more intense the "polycentricity" of a given problem or task the less suitable it will be for resolution through reasoned argument.

(5) The greater the "polycentricity" of a given task the less meaningful participation will be through the presentation of reasoned argument and relevant proofs.

(6) The greater the "polycentricity" of a given task the less effective criteria of decision will be in affording a premise for reasoned argument.

Thus in determining whether or not a particular task is inherently suited to resolution by adjudication two general questions should be asked:

(i) How polycentric is the problem? This will involve subjective judgments both in categorizing or describing the problem and in attempting any sort of measurement.

(ii) Can the problem be presented for resolution in such a form that its inherent polycentricity can be safely disregarded by the adjudicator and the affected parties? That is, is it possible to frame the question in such a way that the polycentricity involved would be effectively isolated? This will involve a judgment as to the ends to be achieved and the costs in so devising the manner of presentation of the problem. In Professor Fuller's example above this was done. 31/ The end desired was a basis for the allocation of risk and losses between the railway and persons using a crossing. No attempt was made to seek an optimum solution and thus much of the polycentricity could therefore be safely ignored.

3. This Analysis Applied to Interest Disputes

(a) The "Task" Defined — The Subject Matter of Interest Disputes 32/

Earlier, the task or problem involved in "interest arbitration" was described as the same as the task commonly carried out in North America by collective bargaining. As this is elaborated in the following, one major premise must be made clear: the task is assumed as embracing the terms

and conditions, economic and non-economic, that are commonly found in collective bargaining agreements governing an employer and his employees organized into trade unions and together forming "appropriate bargaining units". Generally these include:

(i) Scope - In the abstract there is no line between matters suited for resolution either by bargaining or by arbitration but through custom some general demarcation lines have developed. Each and every agreement either expressly or implicitly does make a division between matters requiring agreement or joint resolution and those which are solely "management rights". However, such things as profit sharing, pricing policies, export and import policies and advertising practices are all potential matters for joint resolution.

(ii) Provisions Affecting Personnel Policy - Issues concerning employment, transfers, promotions, discipline and broad general issues over wages and hours are always dealt with by collective agreements in varying degrees of detail.

(iii) Wage and Hour Provisions - Wage and hour terms are the foundation of most disputes over interests. They generally represent the matters of most significance to the employer and employees involved. Here, too, the answers can result in highly complex and numerous rules and conditions. Provisions dealing with shifts, holidays, overtime, job classifications and the internal wage structure as well as rates, bonuses, incentive pay and the like are all commonly found in most collective agreements.

(iv) Fringe Benefits - Vacation provisions, sick leave, insurance for sickness or loss of life and disability, retirement benefits, cafeteria

facilities, general health and safety provisions and so on come within the classification "fringe benefits". It is a classification that is in constant flux. One new development in some industries is the union demand for institution of a guaranteed annual wage.

(v) Union Security - A final classification of the subject matter that is commonly dealt with in collective agreements relates to the union-management and union-employee relationships. This involves union recognition, closed shop or other security provisions, check-off of union dues and more recently the check-off of union members' contributions to political parties.

The complete list of matters that have been dealt with through collective bargaining negotiations in North America would run into the hundreds and the solutions arrived at in resolving them would be almost infinite. Most sets of negotiations deal with several dozen issues and agreements can be as much as a hundred pages in length. Although there is a basic core of matters dealt with, the scope of bargaining and agreements is expanding and constantly changing. The task of determining disputes over these matters can be a lengthy and complex undertaking.

(b) Is the "Task" or "Problem" Polycentric?

(i) Wages and the Internal Wage Structure - Whether a particular unit has had its internal wage structure formally classified or not, an issue involving the allocation of a fixed sum to all employees will give rise to a host of possible solutions. It is almost a perfect example of the type of problem abstractly illustrated by Professor Fuller's analogy to a spider web. A decision to allocate an increase to one classification will carry

with it implications for all other classes. It would seem to be inextricably polycentric. Contemporary wage theory corroborates this judgment. Livernash's general propositions relating to the internal wage structure, reported below, by implication recognize and emphasize the inter-relatedness of each member of the structure to another:

(1) In internal wage-rate comparisons of job content and job relationships, any given job is not related to all other jobs in an equally significant manner. Some jobs are closely related. While such job relationships have no simple, single basis, the larger relationships develop around key jobs.

(2) In external comparison of job rates in the firm to the labour market rates, each job within the plant structure is not related to a market rate in an equally significant manner. Not only are there obvious variations in the "mix" of different types of plants and jobs in different labour markets but there is again no simple, single relationship. Joint integration to the market and to the internal structure, however, evolves around key jobs.

(3) In relating the wage structure to labour cost each job rate is not of the same significance as an element of labour cost. While most particular jobs are a small proportion of total labour cost, some are not and employment at different wage rates varies widely in labour cost significance. 33/

One further implication can be extrapolated from Livernash's comments. It would seem that the polycentricity of relationships within one cluster around a key job would be much greater and of more importance than the degree of polycentricity involved in relationships between the key job clusters. In any event, however, Livernash's observations support a conclusion that the internal wage structure of most plants contains a considerable degree of polycentricity. Indeed, Professor Fuller himself uses the internal wage structure to illustrate the concept:

...A textile mill is in agreement with a labour union that its internal wage scale is out of balance; over the years the payments made for certain kinds of jobs have "got out of line" and are now too high or too low in comparison

with what is paid for other jobs. The company and the union agree that a fund equal to five cents an hour for the whole payroll shall be employed to create a proper balance. If the parties are unable to agree on the adjustments that should be made, the question shall go to arbitration.

Here we have a problem with strong polycentric features. If the weavers are raised, say more than three cents an hour, it will be necessary to raise the spinners; the spinners' wages are, however, locked in a traditional relation with those of spinning doffers, etc. If there are thirty different forms the arbitration award might take; each pattern of the award could produce its own peculiar pattern of repercussions. If such a problem were presented to a single arbitrator, he will be under strong temptation to "try out" various forms of the award in private conversations with the parties. Irregular and improper as such conversations may appear when judged by the usual standards of adjudication, it should be noted that the motive for them may be the arbitrator's desire to preserve the reality of the parties' participation in the decision.... 34/

Again, Livernash corroborates Professor Fuller's opinion by stating that the most appropriate approach for the solution of such a problem would be one of trial and error, and by saying that "job evaluation does not automatically resolve debatable relationships among key jobs, particularly when there is a conflict between internal standards and external comparisons or when strongly held traditional relationships exist". 35/

(ii) The Total Package - Thus far, attention has been focussed solely on the internal wage structure and wages. When the remainder of the "total package" is added, the polycentricity of the problem is further intensified. It requires an allocation of money to wages and to the fringes. Clearly such matters as retirement benefits, sickness insurance and unemployment benefits are part of the cost of labour and although they may present acute problems of measurement they constitute an increasingly significant portion of an employer's labour bill. The inclusion of issues of union security and discipline further complicate the problem. And this quality of polycentricity would seem to be corroborated by the customary practice in

collective bargaining negotiations of making the settlement of individual items contingent on agreement of the whole. 36/

(iii) Future Polycentricity - The symbiotic nature of the employer-employee relationship creates additional polycentricity between future settlements and the present one. For example, suppose that a union was claiming a guaranteed annual wage that would cost the employer three cents an hour per employee for the duration of the agreement. Clearly the union would not be disposed to accepting an equivalent hourly increase in lieu of the establishment of a guaranteed annual wage. The establishment of the principle has a capital value — a carry-over value worth much more than the three cents per hour.

(iv) External Polycentricity - Initially the task was defined as limited solely to determining the terms and conditions to govern one employer-employee relationship. But the single bargaining unit is a part of larger clusters, both industrially and geographically. If the particular arbitration scheme were to be a "one shot" thing then this element of external polycentricity might be ignored. However, if it is relevant, a consideration of the implications of any one solution on the external wage structure would be required. And again, this would have to be extended to the "total package". If the task is defined even more broadly to extend to the whole economy the potential polycentricity becomes overwhelming. Implications for prices, for the balance of payments, for productivity, indeed for the whole economy would be part of the task.

(c) Can the Polycentricity be Disregarded or Accommodated?

On the basis that "interest disputes" in almost any form contain

substantial polycentric features or tendencies the next general question becomes can these be disregarded technically, or can the problem for adjudication be formulated in such a way as to accommodate the inherent polycentricity involved (the effects of doing this both on the efficacy of the underlying organization and as to its acceptability to the affected parties aside).

First, in the abstract, there is no reason why the inter-relatedness of the issues cannot be disregarded. If there were several matters involved they could be dealt with one at a time. This would readily remove the polycentricity from the task. On closer examination, however, it would appear that in some situations this would be difficult if not impossible. Take the guaranteed annual wage example again. 37/ A decision as to whether it should be instituted as a matter of principle cannot be separated from the cost factor. A decision not to institute it would of necessity involve a decision of no cost to the employer and no benefit to the union. The principle and the cost are inextricably inter-related. This will be so with most of the so-called "non-economic" or "principle" issues. 38/ So, apart altogether from the unreality involved in disregarding the polycentricity of the problem, in some situations this will be an impossibility.

Second, and of more importance, it would be possible to define and formulate the problem so as to accommodate some of the polycentricity. The obvious technique was earlier suggested by Professor Fuller. He suggested that the arbitrator could be required to fashion a tentative award and then put the matter to the parties for adjudication on the issue of whether or not it should be implemented; that is, have them direct their argument and proofs to showing why it should not be implemented. By having the matter

put in the negative. Some of the difficulties presented by the polycentricity of the problem are alleviated. Of course, so is an element of the affected parties participation because such a procedure would leave the arbitrator totally free to work out the tentative award. Only after he had arrived at it would any participation be afforded to the parties. Furthermore, although this technique would heighten the parties' participation it would not totally free the matter from its polycentric character. This would still have to be coped with by the participants in preparing, if not presenting, their argument and proofs. Nevertheless, such a technique should render the adjudicative process in this context more meaningful and furthermore it would solve the difficult problem of attempting to adjudicate upon the correct wording and form of the award. But, how acceptable such a procedure would be to the affected parties is of critical importance and difficult to ascertain.

(d) Can Criteria of Decision be Developed for Adjudication of Interest Disputes?

No definite answer to this question can be given. If the task as originally defined were subject to adjudication it is doubtful that an attempt to apply any criteria of decision would be successful from the point of view of affording any substantial grounds for presenting reasoned argument and relevant proofs and correlatively in affording the adjudicator a standard which would result in a reasoned decision. The failure, however, would not be due to the inherent unsuitability of the criteria of decision. Rather, it would result from the problem being too polycentric to be handled by adjudication.

If, however, the polycentricity could be disregarded or accommodated the question of "criteria of decision" would arise. To be workable the

criteria must be sufficiently clear and particular to enable their reasoned application. "Needs of the worker to maintain a reasonable standard of living", for example, would not meet these desiderata. It affords no guidance as to what it should embrace or exclude. Without further elaboration it would be nothing more than a "spurious rule". Similarly, if several criteria were established they would have to be rationally consistent — bound together by a more basic purpose or principle. For example, "needs of the employer to assure an adequate supply of labour" and "needs of the worker to maintain a reasonable standard of living" would not necessarily be consistent and indeed might conflict since they do not share a unifying principle or purpose. Finally, some mention of the use of "comparisons" should be made. These, by definition, are parasitic. If measurable they do afford workable criteria as their popularity in practice suggests but several factors impede their automatic utilization. Comparison to others implies that the affected parties will not be leaders within their group. Further, if a whole industry is subjected to arbitration on that basis, in time the whole adjudicative enterprise would freeze. Comparisons depend on a regime of exchange for their vitality and in time this would be displaced by adjudication. Thus the use of such "parasitic" criteria should be limited to the general situations referred to by Professor Fuller below:

Adjudication Parasitic on Contract. Since the participation of the litigants in adjudication is limited to making an appeal to the arbiter's reason, it is of the essence that adjudication be based on "rational" standards in the essence previously discussed. Arbitrations to set wages and prices can under some circumstances derive their "rationality" from a market, as in the following cases: (1) In times of emergency, where the task of the arbitrator is to preserve normal relationships that threaten to be disturbed by the temporary crisis. There the arbitrator's task becomes increasingly inappropriate. (2) For a segment of industry, where the arbitrator's task is to preserve the "normal relationship" of this segment of industry as a whole. (3) For a single nation which is strongly dependent upon a world market.

The relative success of such adjudicative ventures has led to much confusion. We are told to follow the "middle way of Sweden" or to outlaw the strike by making all wages subject to arbitration, or to carry into peacetime the controls that were so successful in the time of war, etc. These well intentioned proposals can only arise because those who make them do not see that the adjudicative process they praise is parasitic upon a regime of contract. 39/

Thus, although there are some obstacles to overcome in devising criteria of decision for adjudicating interest disputes none would seem to be insuperable at least theoretically. The basic difficulty lies in the severe polycentric character of the problem as defined. Where this can either be abated or ignored satisfactory criteria of decision could be developed.

4. The Significance of This Analysis

(a) Prima Facie "Interest Disputes" are Not Suited to Resolution by Adjudication

If the above definition of the nature of an interest dispute were accepted, then it will be seen that it is inherently polycentric. And being of this character, such a problem is not readily amenable to a process of decision founded on rational argument and reasoned determination. The complexity of the inter-related issues will frustrate any attempt to subject it to reasoned argument and the governance of declared criteria in any meaningful way except in the rarest of circumstances. It might be feasible to resolve disputes over interests adjudicatively in small segments of an industry where "external polycentricity" could be ignored and the "comparable wage rates" were available to afford a rational basis for decision. As well, in situations in which only one or two issues were in dispute and some clear criteria were available either established by legislation or agreed to by the parties, it could be instituted as the "inner

"polycentricity" and could probably be disregarded. But even in these isolated circumstances the adjudicative form would be far from ideal.

(b) Acceptability and Compulsion

The foregoing analysis yields a significant implication with regard to the "acceptability" of "interest arbitration". The critical fault with any attempt to adjudicate a polycentric problem is that it does not allow the parties affected any meaningful participation in the decision process through the institutional form of presenting relevant proofs and reasoned argument. Any attempt will be mere illusion — form without substance. Thus, the almost universal distaste exhibited by both management and labour personnel for so-called "compulsory arbitration" is readily explained. It would seem to stem less from the element of compulsion than from the fact that they are denied any real participation in the decision process. Compulsory collective bargaining and the compulsion connected with Labour Relations Board decisions have been accepted.^{40/} Neither deprives the parties affected of some form of real participation. In collective bargaining this takes the form of negotiation: at the Labour Boards the presentation of proofs and reasoned argument is meaningful as the problems adjudicated upon by the Boards are not seriously polycentric. Thus, it would seem that if a process of decision could be devised which would preserve a substantial manner of participation for the affected parties, compelling resort to that process would not likely render it unacceptable.

(c) The Relation of this Analysis to the Larger Question

The conclusion of this part, that prima facie "interest disputes" are inherently unsuited to determination by adjudication is not intended to

provide a conclusive answer to the more general question of whether some form of adjudication should be adopted. All that the conclusion of unsuitability amounts to is that it is one factor to be weighed in such a consideration, albeit one of substantial importance. In addition, it will be necessary to weigh the costs and benefits of alternative processes including arbitration by a tripartite board, negotiation and perhaps some form of managerial or administrative determination. Furthermore, it will be necessary to consider the "external" costs, the matter of acceptability and the effects on the underlying order if it is to be organized around formally defined "rights" and "wrongs". This general consideration was raised by Professor Fuller in another context:

To act wisely, the economic manager must take into account every circumstance relevant to his decision and must himself assume the initiative in discovering that circumstances are relevant. His decision must be subject to reversal or change as conditions alter. The judge on the other hand, acts upon those facts that are in advance deemed relevant under declared principles of decision. His decision does not simply direct resources and energies; it declares rights, and rights to be meaningful must in some measure stand firm through changing circumstances. When therefore we attempt to discharge tasks of economic management through adjudicative forms there is a serious mismatch between the procedure adopted and the problem to be solved. 41/

Finally, the general variables raised by Professor Dunlop's analysis of industrial relations systems would have to be taken into consideration in order to assess the effect of the particular context in which any such decision process was to operate.

(d) Alternatives to Adjudication

This analysis and the conclusion that interest disputes are generally not suited to resolution by adjudication thus requires that serious consideration be given to alternative methods of decision. Negotiation and

some form of managerial decision are both much more suited to resolution of polycentric problems. Collective bargaining negotiations at present enjoy popular and official recognition as the basic means for handling interest disputes in North America. Third party forms of managerial decision are unknown for the obvious reason that by such a process no manner of participation is afforded the affected parties directly. Interest arbitration by tripartite arbitration boards, however, is not unknown and for that reason should receive some comment.

Arbitration of "interests" has in the past often been carried out by having the decision made by a three-man panel consisting of a "neutral" chairman and a member representing labour and another member representing management participating in the arbitration. On its face, the tripartite board would appear to overcome the most fundamental objection of the adjudicative form. By putting representatives of the disputants on the panel and by requiring a decision, either a majority award or, if that is not possible, the decision of the chairman, the parties are assured of some sort of control or influence over or participation in the decision process.

This type of decision-making, however, is not without its difficulties. If an adjudication is openly not attempted or is accepted as unworkable then tacitly the decision process becomes a variant of negotiation or bargaining. If the decision process is intended to be adjudicative, then the addition of two more adjudicators will not overcome the problems discussed earlier.

There are institutional difficulties with a tripartite board that is not attempting to operate adjudicatively. The first and most obvious difficulty is that it makes the affected parties' participation totally meaningless, limited to arming their representatives on the board with bargaining

weaponry. And if no agreement can be reached by the representative members and the decision is left to the chairman, then the participation through negotiation is seriously discounted. Finally, if seen as a form of bargaining with the ultimate authority vested in the neutral chairman, tripartite arbitration becomes analytically a terminal variant to collective bargaining negotiations, the same as arbitration. The effect of the existence of an authoritative decision-maker on the bargaining process must be further considered. This is the focus of the next part of this chapter.

INTEREST ARBITRATION AS A TERMINAL VARIANT TO COLLECTIVE BARGAINING

The main enquiry here is an analysis of the effects of third party decision processes on collective bargaining when a third party decision is utilized as an alternative to or substitute for the use of economic force in the form of a strike. To accomplish this a model of the dynamics of collective bargaining must be established.

1. Stevens's Conflict-Choice Model of Collective Bargaining Negotiations

(a) Conflict-Choice or Non-Conflict-Choice

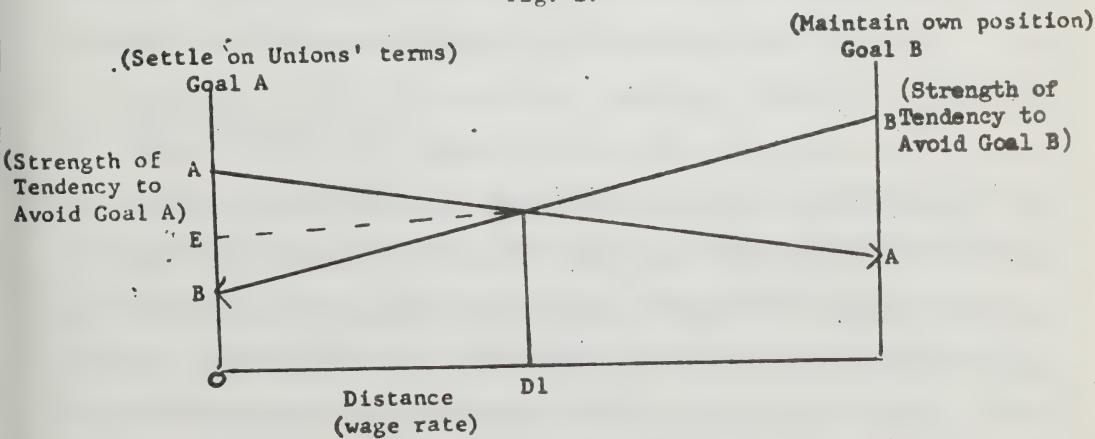
Stevens's model is based on the premise or hypothesis that collective bargaining negotiations are essentially instances of conflict-choice situations. When an individual is faced with a choice between goals, he may react in one of two ways. He may select one of the choices or select neither. Where an individual selects one or the other of two choices the situation is termed one of "non-conflict-choice". If neither choice is made immediately the individual is said to be "conflicted" and his behaviour will be to remain uncertain for a period of time in a behavioural

equilibrium between the two. This "conflict-choice" type of behaviour, Stevens states, most accurately portrays the situation of the parties to collective bargaining negotiations. 42/

(b) The "Avoidance-Avoidance" Type

Stevens explains the behavioural equilibrium in the conflict-choice collective bargaining situation in terms of avoidance gradients. Just as an individual may learn approach tendencies to goals that are rewarding so he may learn to avoid goals that are non-rewarding. The "avoidance gradient" is the name given "the hypothesis that the strength of an individual's tendency to avoid a negative goal is a decreasing function of his distance from the goal". 43/ Stevens's model, illustrated below, is based on avoidance gradients. That is, his conflict-choice theory model is of the "avoidance-avoidance" type. The function AA is an avoidance gradient for goal A representing the increasing strength of the individual (here the Company) to avoid goal A as he gets closer to it. BB is the avoidance gradient for goal B. Only when the avoidance gradients do not intersect and no equilibrium position is created will the parties be expected to elect one or the other of the two goals.

Fig. 1.



The "avoidance-avoidance" conflict-choice model determines two variables:

- (1) the distance the individual is away from each goal in equilibrium, and
- (2) the strength of the tendency to avoid both goals which is the same in equilibrium and is measured by OE in the figure above. The theory suggests that this equilibrium is apt to result in tension and aberrant behaviour in an increasing function of the strength of the tendency to avoid and the length of time an individual is in an equilibrium position. In addition, "the theory of conflict-choice involving this kind of behavioural equilibrium suggests that if there were available some compromise behaviour -- some strategy other than electing either of the two negative goals — the individual should be expected to choose it". 44/

(c) The Phenomenon of Negotiation

This explains why the parties to collective bargaining conflicts seek to negotiate. Suppose a union demands a certain set of terms and states that if they are not granted it will call a strike. In such a situation the company will be conflicted. It will be faced with two negative goals as depicted in the figure above — expectations of costs consequent upon the election of either choice — either pay the demanded wages or take a strike. The company should not be expected to make either choice immediately. Rather, it should be expected to find some escape but the symbiotic nature of the collective bargaining relationship does not allow it the option of simply abandoning the choice situation. Its only alternative apart from accepting one or the other of the negative goals is to seek some compromise via negotiation. The union as well, in presenting the choice situation, is also conflicted. It now has two choices — either accept the company's terms or strike. Stevens therefore concludes that, "in a bilateral monopoly situation such as that represented by collective bargaining,

the parties would probably prefer to play the game negotiation rather than the game take-it-or-leave it". 45/

2. The Function of the Strike

(a) As a Conflicting Device

To some extent the function of the strike in collective bargaining negotiations has been anticipated by the foregoing discussion of the conflict-choice model. Primarily it is the means whereby the parties are able to inflict costs of disagreement on one another. 46/ It is the customary technique for creating conflict-choice situations. Although it is generally regarded as a union weapon, it operates as a conflictual device for both parties for the employer equally can impose costs of disagreement on the union by threatening to or actually resisting a strike.

(b) As a Basis of Measurement

In addition to operating as the critical conflictual device, the strike has other functions in collective bargaining negotiations. That is, it affords a standard against which the parties can measure the cost of compromise positions. It determines the least favourable terms acceptable to a party rather than either taking or inflicting a strike. 47/

(c) As a Coercive Force

Finally, the strike threat is a coercive force. It operates on the parties equilibrium positions. As a strike deadline approaches the bluff of the parties positions is squeezed out. The approach of the deadline provides a moment of truth. It is only at the time of the deadline that the alternatives are truly specified. 48/

Thus, the underlying bargaining power, expressed through the ability to inflict costs of disagreement by striking or withholding a strike provides a necessary constituent to collective bargaining negotiations. It creates a conflict-choice situation and in that way drives the conflicted parties to seek some compromise by way of negotiation. In addition, the anticipated costs associated with the strike serve to provide a standard of measurement and the approach of a strike deadline will force the parties to reveal their ultimate positions and face the true alternatives. The ability to inflict costs of disagreement, however, does not provide a complete explanation of collective bargaining behaviour. It does not account for collective bargaining negotiation as a process of decision or "social control technique". Collective bargaining negotiation as distinct from its underlying power relationships is a technique for "directing, controlling and exploiting power in the formulation of the web of rules governing the work place". 49/ As Stevens suggests, "although negotiation reflects and transforms the basic power relationships inherent in the situation, we should recognize that "negotiation power" is a type of power in its own right". 50/ Therefore, to fully appreciate the implications of substituting a form of third party decision as a terminal variant to collective bargaining negotiations it is essential to examine the constituents of negotiation as well as the role played by the strike.

3. The Collective Bargaining Negotiation Process

(a) The Tools of the Participants — Tactics

The parties to collective bargaining participate in the decision through negotiation as distinct from the presentation of proofs and reasoned argument used in adjudication. Negotiation is a process involving

the exchange of information whereby the parties manipulate each other or operate on one another through the use of tactics in order to attain the most favourable settlement possible. 51/

In order to relate the classification of tactics to the "avoidance-avoidance" model they can be classified into two groups: those that operate so as to raise an opponent's avoidance gradient toward his goal and those that lower an opponent's avoidance gradient to settling on one's own terms.52/ This classification, however, does not yield a satisfactory understanding of the particular types of tactics available to negotiations. Stevens suggests the following "functional" classification:

- (1) Representing one's own preferences.
- (2) Attempts to discover one's opponent's preferences.
- (3) Attempts to alter opponent's preferences.
- (4) Attempts to alter opponent's "expectations" as to his negotiation or "extra-negotiation" environment.
- (5) Attempts to alter or establish opponent's "expectations" as to one's own intended course of action.
- (6) Attempts to alter or establish the preferences and course of third parties where they may affect the outcome of negotiations. 53/

Tactics 1 and 2 are basically information receiving and transmitting. Classifications 3 and 4 are termed by Stevens to be "persuasion" tactics.54/ And classifications 5 and 6 are what he terms "tactics of coercion". 55/ The most characteristic examples of these tactics will be referred to in context in discussing their use in the process of negotiation.

(b) The Early Stages of the Negotiation Process

Two conditions are essential for agreement: (1) that the two parties' equilibrium positions become consonant, and (2) that this fact becomes manifest — that it is known one to the other. 56/ The major tactical assignment in the early stages of negotiation is to bring about the first condition. And the process of negotiation usually involves the full tactical mix with emphasis on tactics of coercion. Three of the most important specific tactics illustrate the nature of the negotiation process as it functions to bring equilibrium positions into consonance.

(i) The Large Bargaining Demand — This common practice can be explained on several grounds. Often it is the product of intra-organizational interaction in preparing the original demand or counter-proposal. But it is more than that. It is really an information seeking and information revealing device — a particularization of tactic classifications 1 and 2 above. It plays a security function in concealing one's own preferences, but, as well, in the hands of skilful negotiators it reveals. 57/ It also operates to influence an opponent's expectations as to what will be necessary to settle and as such can involve bluff and deception. This is not a trading operation: it is rather a communications tactic.

(ii) "Persuasion" as a Tactic — Generally, collective bargaining negotiation theory has tended to deprecate the role of persuasion as an effective tool. However, although it may be difficult to assess its impact on outcomes in any meaningful way, it does touch upon several particular tactical forms relevant to third party decision as a terminal variant of negotiations.

Persuasion is defined by Stevens as a party's attempts to control his opponent's course of action by operating on his preference function or upon his expectations about the extra-negotiation environment. 58/ Stevens illustrates by an example, distinguishing persuasive tactics from coercive ones: "The expected cost to A of a strike by B is compounded of: (a) the cost of a strike if it occurs; (b) the probability that a strike will occur. B's tactical operations upon A's expectations regarding (a) are persuasive, whereas B's tactical operations upon A's expectations regarding (b) are coercive". 59/

The first question of importance is to what extent is the use of economic data and the basic criteria of wage determination effective as instruments of persuasion. Stevens's conclusion is that generally they are not significant. 60/ Because the data and criteria are so uncertain and variable their use for tactics of persuasion is very limited, especially where the negotiators are experienced and sophisticated. He concludes that "while it is clear that there is no firm consensus on the matter, the essential thrust of these views as a whole is certainly to de-emphasize the importance of persuasion as a tactic in collective bargaining negotiation — at least insofar as persuasion might be a function of the use of the commonly adduced wage standards." 61/

The second significant point to make vis-à-vis the use of persuasion as a tactic in collective bargaining negotiations is in its relationship to behaviour in the "conflict-choice" avoidance-avoidance context. These tactics tend to lower an opponent's avoidance gradient to settlement on a party's terms rather than operating on the opponent's avoidance gradient -- insisting on his own position. Stevens's hypothesis is that these sorts of tactics

are far less likely to lead to tension and behavioural aberrations and thus are less likely than tactics of coercion to lead to a breakdown in negotiations. 62/ For this reason they are preferable to coercive tactics.

(iii) Coercive Tactics - Accepting the fact that tactics of persuasion play a relatively minor determinative role in the outcome of collective bargaining negotiations, it follows that tactics of coercion, despite their undesirable effect on behavioural tendencies, are of substantial importance. Coercive tactics relate to opportunity functions rather than preference functions. They are defined by Stevens as "A's attempts to control B's course of action by operating upon B's opportunity function (the range of outcomes at least apparently available to B) — as this depends upon A's own course of action and/or the courses of action of 'third parties'". 63/ As mentioned, this embraces classifications 5 and 6 set out earlier, that is, tactics designed to alter an opponent's expectations about one's own course of action and tactics designed to alter or establish the course of actions of third parties where relevant.

These tactics — tactics of coercion — Stevens divides into two subclasses, "not-bluff" and "bluff". "Not-bluff" simply means a party's assertion to do what he intends to do at the time of the assertion. 64/ Conversely, "bluff" is when a negotiator states he will do something that he does not intend to do at the time he makes the assertion. 65/

There are two significant forms that a "not-bluff" can take although both involve similar problems of communicating a commitment. Firstly, in Stevens's terminology, the tactic can be a "straightforward" not-bluff. That is, at the time it is made, it signifies a course of action that the negotiator would unconditionally prefer to take. 66/ But another form of

not-bluff, the "game-theory type threat" is somewhat different. Schelling states this to be the situation in which "one asserts that he will do, in a contingency, what he would manifestly prefer not to do if the contingency occurred". 67/ For example, a party may threaten to take a strike unless his demand is met although he would really prefer to concede rather than take the strike. The significance of this relates to Stevens's concept of "negotiation power" rather than "bargaining power". In the straightforward not-bluff, true bargaining power is reflected, whereas, in the "game theory-type threat" the power is contrived and is a distortion of the basic power positions of the party's underlying negotiations.

Closely related to these three tactics is the matter of commitment. 68/ It can involve its own special tactical mix. Commitment is a technique for establishing credibility. That is, a party making a not-bluff must be able to credibly communicate his assertion. And in the case of the game-theory type threat this is doubly more important because the party will want to ensure his own performance as well. Stevens observes, however, that commitment tactics are generally disapproved of in collective bargaining. 69/ And he further cautions that too much reliance on the game-theory type threat fails to perceive the uncertainties inherent in collective bargaining which renders it a less appropriate tactic than in situations where the parties are fully informed maximizers. 70/

"Bluff" functions in collective bargaining negotiations because of the inherent uncertainty due to a lack of perfect knowledge but it involves serious credibility problems. A bluff that is seen as a bluff is useless. Furthermore, the presence of a strike deadline in the later stages of negotiation does much to squeeze the bluff out of negotiation.

(c) The Later Stages of the Negotiation Process

As mentioned earlier, two conditions are essential for agreement:

(1) that the two parties' equilibrium positions become consonant and (2) that this fact becomes manifest — that is, known one to the other. The major tactical assignment in the early stages of negotiation is to bring about the first condition. And it is usually characterized by the full tactical mix with emphasis on coercive tactics. However, consonance of the parties' equilibrium position, however necessary, is not necessarily a sufficient condition for agreement. In addition, the fact of consonance must become known to both parties. Once this becomes manifest, Stevens postulates, the negotiation process takes a different character. 71/ "In other words, revelation of the contract zone marks a sort of divide — the tactic mix and the important tactical problems shift toward co-operation and co-ordination." 72/

There are difficult problems facing negotiators in rendering the "contract zone" manifest. Any retreat can be interpreted as a sign of weakness and have the effect of shifting the opponent's position out of consonance.73/ Further, if the consonance offers a "range of outcomes" or "contract zone", the one who waits gains the advantage. 74/ A third related problem arises if the alternative to no agreement is a variant such as strike negotiations. In such a situation a party might be reluctant to reveal his actual position, wishing to save something for strike negotiation. 75/

Assuming, however, that the contract zone does become manifest, then the character of the game will change. The conditions of bargaining then more closely approximate what is called a "pure bargaining" game, that is, one in which both parties prefer any settlement to no settlement but also

one in which one party's gain is the other's loss. The only reason for one to concede is his belief that the other will not and vice versa. The task for the negotiators at this stage is one of resolving this dilemma. Schelling suggests that this is done by the parties converging on some external solution that has some sort of "intrinsic magnetism". 76/ Translating that into collective bargaining terms, Stevens suggest that "following patterns" corroborates Schelling's thesis. In situations in which there is no clear pattern, Stevens suggests that the negotiation process itself must provide some sort of convergence mechanism. He suggests that the negotiators must attempt to "display" their position to have the properties of prominence, uniqueness and magnetism that make it a likely candidate for making the indeterminate determinate. Stevens suggests that here the basic criteria of (1) changes in cost of living, (2) ability to pay, and (3) comparability can play a significant role in negotiations by establishing a focus for convergence. 77/

(d) Some Qualifications

The "conflict-choice" model upon which the foregoing is based not only over-simplifies the negotiation process but to some degree over-emphasizes the conflict nature of collective bargaining negotiations. Not all of the dispute is of a "fixed sum" nature — one in which one party's gain is another's loss. Some issues can be of a "varying-sum" nature — where a payoff yields a gain to both parties. These have been termed items with "integrative" potential 78/ and the ideal process for their resolution is some form of joint problem solving. The conversion of bargaining into a "mixed" form has the effect of further complicating the negotiation process and the use of tactics as well as presenting acute problems of measurement.79/

Stevens does point out the problems of "dimensionability and measurement" involved and suggests that they can become isolated or clarified if a sub-division of the "total" package is seen as comprised of two categories:

(1) What are essentially alterations in the terms of trade within the context of a given collective bargaining "game" that constituted by the bargaining relationship in question. A change in the wage rate is a case in point.

(2) What are essentially alterations in the basic ground rules of the collective bargaining game itself, in the definition of the role relationships of the parties. Demands which are perceived as a union challenge of the parties. Demands which are perceived as a union challenge to management control are of this variety. 80/

The latter he suggests cause difficulties because even though the negotiators are willing to compromise they are faced with an inability to define their own equilibrium positions because of the non-uni-dimension-ability and problems of measurement involved. These problems, however, would seem to be equally present in "third party decision processes". That is, they would exist regardless of the type of institutional process utilized.

One final qualification and complicating factor arises from the fact that the negotiators are delegates and this is reflected in their negotiation behaviour. 81/ The negotiators are responsible to their constituents. They are faced not only with accommodating organizational demands but also with "selling" sensitive settlements. As well, particularly from the union negotiators point of view, his bargaining success and style will often have a definite effect on his future and position within his organization. These "intra-organizational" factors will be further considered in light of "third-party" decision as a sequential variant to negotiations.

These complicating factors, integrative bargaining and intraorganizational bargaining, make the bargaining process and negotiation much more difficult and complex than it has been portrayed. Their different demands create serious dilemmas for negotiators and qualify their strategies and behaviour. Nevertheless, distributive bargaining, the fixed-sum game, is the core of collective bargaining as it operates in North America and it is this aspect that must be concentrated upon in any consideration of possible modifications. Therefore, the over-simplified model of negotiations and collective bargaining retains its relevance to the present enquiry. It serves to illustrate the character of the process and the necessary conditions for its successful operation.

(e) Necessary Conditions for Distributive Bargaining

(1) It is essential for meaningful collective bargaining negotiations that the participants have some way of creating a "conflict-choice" situation. This is absolutely necessary to insure bargaining. It is essential that some alternative negative goal be available to the parties — some way of imposing "costs of disagreement". This is basic to the bargaining process as it now operates. In this regard the coercive power of the alternative is critical. Almost all alternatives have some costs. To be effective, however, the "costs of disagreement" must bear some considerable or substantial relation to the alternative "costs of agreement". They must be sufficient to create a real conflict and equilibrium. If they do not, a party would immediately elect the least negative of the two goals and forego meaningful negotiation.

(2) At the early stages of bargaining negotiation there must be some degree of indeterminateness. The task of the early stages is to turn the

initial indeterminateness and lack of consonance in the equilibrium positions into a determinate consonance — the most favourable possible. In the absence of a clear governing standard solution, however, the very nature of the problem and its polycentricity creates this condition.

(3) At the later stages, when a contract zone becomes manifest, then, what becomes important is the establishment of a convergence mechanism, some package of terms that both parties can seize upon without losing all by making the first move. This too, however, can be provided in a number of ways.

Thus it would seem that the most important factor to consider in attempting to assess the effect on some form of third party decision as a terminal variant to negotiations is the capacity of the third party decision process to provide the necessary conflict-choice conditions customarily afforded by the strike. All else is secondary. The function played by a strike as a measurement device is not significant insofar as preserving negotiation conditions is concerned. In any event this function is readily covered by an assessment of the probabilities of a third party decision. In any event, both measures are highly speculative. The coercive quality or role of the strike is simply another aspect of its ability to create a substantial conflict-choice situation and therefore does not require special attention. Thus, it seems clear that the critical feature of any terminal variant will be its capacity to create a substantial conflict-choice equilibrium in both parties.

4. Interest Arbitration and Collective Bargaining Negotiations

There are many institutional variations to third party decision processes

but this analysis will concern itself solely with three basic forms. The first model will be the "adjudicative model" developed earlier, that is one which purports to guarantee the affected parties participation through the presentation of proofs and reasoned argument and which purports to determine disputes through the reasoned application of existing criteria of decision. The second model is termed "tripartite arbitration" and is characterized by a three or five man tribunal consisting of an independent chairman and members representing management and labour. In this model it is assumed that the tribunal does not purport to apply criteria of decision nor guarantee participation through the presentation of proofs and reasoned argument. The third model, termed the "one or the other" arbitration model is characterized by its limitation in decision to a choice between the final position of either party. In all three models it is assumed that either party has the ability to inflict arbitration on its opponent just as they have the ability to inflict economic costs through striking or resisting a strike. And in the following analysis the main enquiry will be into the "conflicting power" of arbitration and into the nature and quality of the participation afforded the affected parties in the pre-arbitral negotiations, during arbitration, and in the post-hearing arbitral decision processes.

(a) Arbitration by Adjudication

When either party has the ability to institute an adjudication, in form the effect will be much the same as when the union is able to strike and the company is able to resist the strike. There are "costs" associated with arbitration that can be inflicted by one party on his opponent. The potential "costs" are of three related types. "Going to arbitration" creates extra expenses both in time and money. It is costly also in that it can be

"undesirable" to both parties. 82/ And finally there is the cost of "uncertainty" — that is the "cost" of the probability of the award being less desirable than could have been obtained through agreement. The central question is: will the cumulative effect of these costs be such as to produce a sufficient conflict-choice equilibrium in each of the parties to force them to seek an alternative goal, a compromise through negotiation.

Only in a minority of cases will the cost of proceeding to arbitration approach the costs of a work stoppage. If the bargaining unit is small and the arbitration proceeding cumbersome and complex it is possible that the expense in proceeding to arbitration would approximate the cost of lost wages and a shutdown of operations. But this would be rare. Generally speaking the cost of arbitration in this sense would be significant compared to the cost of a work stoppage. Furthermore, the cost of proceeding to arbitration should be readily determinable and certain. Thus the uncertainty of the cost of a strike would not be reproduced by the costs of proceeding to arbitration — a fact that should tend to reduce their conflicting power.

The second type of costs associated with arbitration is difficult to assess. In some cases the disruptive effect of failing to agree and having to submit to an adversary process will be seen as undesirable and costly in disrupting the ongoing relationship. Furthermore, in some cases the revealing of internal affairs will be viewed as costly particularly by management. And this cost can be even more significant if one of the "criteria of decision" were related to a company's ability to pay. On the other hand a work stoppage could be far more disruptive of the existing relationship and the adverse publicity generated could be seen as a cost similar to the cost of a third party having access to internal financial affairs.

The cost of an award, the cost of uncertainty, will vary directly with the degree of certainty or predictability surrounding the arbitration system. To some extent, the threat of arbitration and the uncertainty as to what the result might be will have a coercive effect and tend to move the parties' equilibrium positions closer together. Paradoxically, however, the likelihood of a contract zone being created will diminish correspondingly. The attempt to apply some objective criteria will generally result in a range of possible outcomes. Regardless of the certainty and predictability, upper and lower limits will be fairly clear. The more certain and more predictable the outcome, of course, the closer together these upper and lower limits will be. The greater the uncertainty and unpredictability the greater the coercive force will be initially but it should be expected that this effect would cease short of a contract zone. At some point near the most undesirable end of the range of outcomes it should be expected that a party would reason that to concede further is not worth it — that the probabilities of a less undesirable award outweigh the costs of settlement. If both parties reason in this way the result would be a gap rather than a contract zone. The chance of a contract zone emerging will be diminished in that both parties will tend only to concede to positions slightly above the worst they think they could fare in arbitration. And the greater the uncertainty inherent in the situation the larger the gap is liable to be. On the other hand, where the outcome of an arbitration is accurately predictable and certain the equilibrium positions will be moved to coincidence and it should be expected that the parties would agree rather than go to arbitration. In this situation, however, negotiation would be almost supplanted. Certainty and compromise are rationally inconsistent.

The character of the parties' participation by way of pre-arbitral negotiation will vary depending upon the suitability of the situation for adjudication. The less suitable it is, the greater the uncertainty in result and correspondingly the more meaningful and functional pre-arbitral negotiation will be. If the problem is relatively well suited to decision by application of existing criteria uncertainty of outcome should be diminished and the role of negotiation correspondingly largely supplanted. The "tactic mix" would likely be more heavily weighted to the use of tactics of persuasion with arguments relating to the established criteria of decision. The more predictable and certain the result, the less available and useful will be any tactics of coercion.

Participation at the arbitration stage is through the presentation of proofs and reasoned argument for a decision in ones favour. As has been pointed out, only in a relatively few situations would this have any substance. In most interest dispute cases the attempt to adjudicate will be inept and futile. In any event if no agreement is reached and a dispute proceeds to the arbitration stage this form of participation would not rest on the pre-arbitral negotiation and would tend to render any such negotiation otiose. In this sense post-bargaining adjudication is highly inefficient as a sequential variant.

In sum, the combination of collective bargaining negotiation followed by an adjudicative arbitral system where bargaining fails to result in agreement would be a serious mismatch. Only in the situations where the problem is unsuited for adjudication would the likelihood of any bargaining be present. And in those situations because of the weak conflicting power of arbitration and its tendency to create a "gap" in equilibrium positions

short of agreement, the incidence of arbitration would be increased. In result the parties would be deprived of their participation through negotiation and at the adjudication. On the other hand, it should be expected that if the dispute can be subjected to some objective criteria, the ready predictability would bring equilibrium positions into consonance and agreement. But the resulting agreement would not reflect real negotiation power. It would be substantially determined by the adjudicative criteria. If no agreement resulted at that stage, however, the adjudicative process being suitable would yield real participation. But, if adjudication were utilized there would be no reason for not providing for pre-arbitral negotiation although the success of such negotiations in reaching agreement could not be regarded as akin to collective bargaining negotiations as they have been described. Any negotiation and agreement would not be the product of conflict but rather the result of a realization by the parties that it would be a waste of time to proceed to arbitration.

In this sense adjudicative decision would weaken collective bargaining. And further it could be said to be weakened in that the conflicting power would not be likely to create conflict-choice equilibriums and, even though it were sufficient for that, there would be little likelihood that it would produce a contract zone. The most likely result would be a contract gap and deadlock thus necessitating arbitration. Only in the very occasional situation in which an interest dispute situation could be readily adjudicated upon would this combination of pre-arbitral bargaining and arbitration by adjudication be workable and there the bargaining and agreement should not be expected to simulate collective bargaining as it is now commonly operating.

(b) Non-Adjudicative "Tripartite" Arbitration

In this model, the decision process is not viewed as an attempt to rationally apply existing criteria in arriving at a decision. The participation of the parties at the arbitration is not viewed as solely the presentation of proofs and reasoned argument. Arbitration is seen as a process of negotiation with the impartial chairman having the power to make the award where no majority award can be arrived at.

The "conflicting power" of this sort of arbitration process will be similar to that of the adjudication model. The three types of costs will be present. If anything, however, there should be greater uncertainty as to the actual result but greater certainty that the decision will be a middle or compromise decision. Thus, because of the negotiation character of the arbitral decision, the likelihood of a "gap" would tend to be increased despite the greater coercive power resulting from the uncertainty.

There are three levels of participation afforded to the affected parties by this combination: negotiation prior to arbitration, presentation of their case to the arbitral tribunal, and negotiation by the representative members of the tribunal following the hearing in the course of decision. If the threat of arbitration results in a conflict-choice equilibrium for both parties it should be expected that the uncertainty surrounding the outcome of an arbitration would provide the necessary conflict for some bargaining. It should be expected on the other hand that in a large number of cases it would not result in agreement. The same conditions that were noted in connection with adjudication would be present and even enhanced by the fact that the arbitration system provided for further negotiation and compromise. It should be expected then that the parties would not be prepared to negotiate

beyond their most favourable settlement positions at a pre-arbitral stage. The presence of tripartite arbitration would tend to influence the parties to save something for arbitration. 83/ Participation at any hearing before a tripartite tribunal would be almost superfluous. The primary goal of the participants at this stage would be to arm their representative on the board with bargaining tools and secondly to persuade or attempt to influence the chairman. The tactics of the participants would tend to be communicative and persuasive tactics and not rational argument. In this sense the hearing would be more efficient than in the case of adjudication but not of much substantial value because of the fact that the final form of participation is through the instrumentality of the representative members on the arbitral tribunal.

At this stage, however, the character of the negotiation game is substantially altered. In one sense the arbitral hearing turns the contract gap into a contract zone. A decision will be reached. It will not, however, necessarily result from agreement. The coercive power in the representatives flows from their ability to disagree, dissent and resign. And the actual effect of these alternatives will depend on the nature of the extra-arbitral environment and the position of the arbitral system in the larger industrial relations system. The chairman's coercive base is his ability to agree with a party's opponent and thereby create a majority award. Thus, the key source of power lies with the neutral third party. And this fact should be expected to direct the tactics of both representatives toward influencing the chairman's position and through him their opponents equilibrium positions. The representatives main tactical range will be persuasive whereas the third party chairman will have greater resort to a full mix of tactics including tactics of coercion.

This institutional design is better suited than adjudication for the resolution of this polycentric type of problem. Furthermore, the sequential variant of a tripartite board is more efficient in that it continues negotiation as the main decision process. But it has weaknesses apart from the basic departure of removing economic force as a conflict inducing device. In the first place the tripartite board even more than the adjudicative model should be expected to result in a pre-arbitral contract gap. Secondly, the participation afforded the parties at any hearing will be perfunctory and insubstantial. The real participation afforded the disputants is the negotiation to be carried on by the representative members on the arbitral panel. And at this stage the real power lies with the neutral third party. Furthermore, to ensure effective participation, the representative members must have some close relationship to their organizations. But where this is so it should be expected that there would be a tendency for the representative to shirk responsibility for an unfavourable award and thereby hamper the effectiveness of the participation afforded by the system. On the other hand where the representatives are not closely related to the disputants the obvious short-coming is that the participation would not be nearly so adequate and acceptable.

(c) Stevens's "One or the Other Criterion"

This model seeks to overcome the central fault with the tripartite model. Its central aim is to simulate a conflict-choice situation as would be created by a threat to strike and thereby make the main decision process pre-arbitral collective bargaining negotiation. In this model as in the preceding ones, the right to strike and lockout is prohibited and either party is free to invoke arbitration. The board can be either tripartite or

single and with or without a hearing. Its distinctive feature is that the arbitrator must base his award on "one or the other" of the parties final positions. Compromise awards would be prohibited.

Although the basic power relationships would be altered in the same way as in the two foregoing models, viz. the right to strike is prohibited, nevertheless Stevens postulates that the structure would produce a sufficient "conflict-choice" situation to evoke the necessary responses of concession and compromise.^{84/} By restricting the arbitral positions to "one or the other" the uncertainty inherent in the situation would be institutionalized to provide a coercive force. As well, Stevens claims that this model would serve the "particular solution" function of strike strategy. He states that "for just as the parties may use the expected cost of a strike as a benchmark against which to measure the cost of particular concessions, so might they use the expected (opportunity) cost of arbitration".⁸⁵ Although this might be seen as an extremely difficult standard to measure against — the cost of concession against the cost of the probability of the opponent's whole position being adopted — the same criticism can be made with regard to measurement against the cost of a strike.

Of the three models, this last model is most likely to generate sufficient costs of disagreement to create a real and lasting conflict-choice equilibrium position. It, more than the others, would tend to generate a desire to seek a compromise through negotiation. And it, more than the preceding two models, would preserve the negotiation process as the main process of participation in the decision. Of course, if the negotiation did not result in agreement and arbitration were necessary, then the power shifts to the third party but it is limited to one or two possible results.

But it would be open to attack in that it would be arbitrary fiat with no rational or other justifying basis.

As well, objection can be taken with this model on the ground that intra-organization conflicts facing negotiators could lead to implementing arbitration in order to avoid taking the responsibility of a difficult decision or one that could not be sold to the constituents. This could be alleviated to some degree by making it clear institutionally that the responsibility for arbitration was solely in the hands of the negotiators. Nevertheless, this objection is a valid fact and would have to be considered in any decision as to a choice of arbitration as an alternative to free collective bargaining with the right to strike.

One further objection to this model is that a risk is created that the parties could adopt unrealistic intransigent positions and that any decision would yield an unsatisfactory award. This situation could be guarded against by institutionally providing an adjudicative appeal to another third party to show cause why the award or some part of the award should not be implemented. 86/

(d) Summary

It would be difficult to have an arbitration system operating as a sequential variant of collective bargaining negotiations that afforded any meaningful participation to the affected parties either by way of presenting proofs and reasoned arguments as in the adjudicative model or through non-adjudicative "tripartite" arbitration. The adjudicative form of arbitration is only suitable for a few isolated situations and in those situations negotiation would be supplanted. But in the situations in which it

could be utilized, that objection would be counteracted by the fact that participation by way of the presentation of proofs and reasoned argument would be substantial. Tripartite arbitration is unsatisfactory in that it lodges the most important form of participation through negotiation in the arbitral body. Collective bargaining negotiations will be weakened in any situation in which a compromise position is open to the arbitral authority. Furthermore, where the situation is not suited for the adjudicative form of decision the hearing will be of little value as a device for giving the parties any meaningful participation in the decision process.

When the arbitration process itself is deficient the need to give a real influence and share in the decision to the parties through negotiation is heightened. The form of decision most likely to reproduce the conflict-choice climate essential for negotiation is one in which the third party decision maker is limited to siding with either one party or the other. As a process of decision it can be objected to as being arbitrary but as a device to ensure the integrity of negotiations it would be the most functional. The latter form of arbitration has never been operative. 87/ The "adjudicative" model finds its most mature application in Australia whereas a form of the "tripartite" model coupled with active pre-arbitral collective bargaining has been in operation in Singapore for the past seven years.

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- 7/ Ibid. at p. 14.
- 8/ Ibid. at pp. 317-18 and 331-34.
- 9/ Ibid. at p. 14.
- 10/ This concept is fundamental to both the Federal American labour relations legislation and most Canadian labour relations statutes. For an elaborate discussion of its role see, Cox, "The Duty to Bargain In Good Faith", 71 H.L.R. 1401 (1958).
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- 13/ Hart and Sacks, Cases and Materials on the Legal Process, mimeo. ed. 1958, pp. 377-380.
- 14/ Professor Paul C. Weiler in Study No. 6, Task Force on Labour Relations entitled "Labour Arbitration and Industrial Change", deals with this in greater detail.
- 15/ That is if the decision maker regards himself as bound to decide all like cases in a like manner then the decisions in effect become law in the sense that in a similar future dispute the same result will be reached.
- 16/ Supra, ref. 13.
- 17/ Supra, ref. 2.
- 18/ Ibid. p. 11.
- 19/ Ibid.

- 20/ See, Fuller, Ibid. pp. 11-17.
- 21/ Ibid.
- 22/ See, "Professional Responsibility: A Statement, being the Report of the Joint Conference on Professional Responsibility of the American Bar Association and the Association of American Law Schools" A.B.A. 1159 (1958).
- 23/ Supra, ref. 2 at p. 36.
- 24/ Ibid. at p. 37.
- 25/ Ibid. at pp. 38-39.
- 26/ Ibid. at pp. 39-40.
- 27/ Ibid. at p. 45.
- 28/ Lon L. Fuller, The Morality of Law, (New Haven, 1964) at p. 171-72.
- 29/ In "On Legalistic Reasoning - A Footnote to Weber", W.S.L. Rev. 148 (1966), Friedman argues that the presence or absence of explicit rules does not itself provide the distinction between what Weber classified as "irrational" (not guided by general rules) and "rational" systems of legal thought. Rules which he identifies as not affording a premise for logical elaboration - "spurious rules" hint that that provision of criteria does not in itself make a particular task appropriate for ordering by adjudication — see particularly 154-155.
- 30/ See Fuller, supra, ref. 2, pp. 49-50.
- 31/ See, page 14 ante, and ref. 26.
- 32/ See generally, Chamberlain and Kuhn, Collective Bargaining, second edition, New York: McGraw-Hill, 1965, ch. 4.
- 33/ Robert E. Livernash, "The Internal Wage Structure" in Taylor and Pierson (eds.) "New Concepts in Wage Determination", New York: McGraw-Hill at pp. 147-48.
- 34/ Supra, ref. 2 at p. 37.
- 35/ Supra, ref. 33 at p. 164.
- 36/ See generally, Stevens, supra, ref. 3 at p. 44.
- 37/ Ante, p. 23.
- 38/ That is matters resolved by bargaining or arbitration like "union security" - matters that are not directly converted into dollars and cents but rather relate to the power of the parties.

39/ Supra, ref. 2 at p. 49.

40/ In both Canada and the United States employers are compelled to bargain with unions representing a majority of their employees. And in Ontario arbitration of rights disputes is compulsory. These procedures have achieved a substantial and effective degree of acceptability from both management and labour.

41/ Supra, ref. 28 at p. 172.

42/ For a much more elaborate discussion see Stevens, Strategy and Collective Bargaining Negotiation, supra, ref. 3 ch. 2, "Conflict-Choice Model of Negotiation" pp. 13-26.

43/ Ibid. p. 15.

44/ Ibid. p. 16.

45/ Ibid. p. 18.

46/ See generally, Chamberlain and Kuhn, supra, ref. 32 pp. 170-73 and Walton and McKersie, A Behavioral Theory of Labor Negotiations, New York: McGraw-Hill, 1965 at pp. 52-56.

47/ Supra, ref. 4 at p. 40.

48/ Supra, ref. 3 at p. 100.

49/ Ibid. p. 2.

50/ Ibid. p. 3.

51/ For a more elaborate description and an acute distinction between negotiation and bargaining see Stevens, supra, ref. 3 ch. 1, particularly pp. 1-4.

52/ Supra, ref. 3 p. 21.

53/ Ibid. p. 57.

54/ Ibid. p. 58.

55/ Ibid. p. 58.

56/ As argued and developed by Stevens, ibid. pp. 21-22 as follows:

The definition of equilibrium positions implies that it is a necessary condition for agreement that the equilibrium positions of the parties be brought to the same position. One definite task to be accomplished by the exchange of information in negotiation is to bring about this consonance (necessary but not sufficient for agreement) about. Beyond this, the parties must somehow be mutually informed of the similarity of their equilibrium positions if the fact of this equality is to create a route to agreement.

- 57/ Ibid. p. 62.
- 58/ Ibid. p. 67.
- 59/ Ibid. p. 67.
- 60/ Ibid. pp. 69-73.
- 61/ Ibid. p. 72.
- 62/ Ibid. pp. 72-73.
- 63/ Ibid. p. 58.
- 64/ Ibid. p. 78.
- 65/ Ibid. p. 89.
- 66/ Ibid. pp. 78-79.
- 67/ Ibid. p. 79.
- 68/ See generally, Stevens, supra, ref. 3 pp. 82-87.
- 69/ Ibid. pp. 84-85.
- 70/ Ibid. pp. 85-86.
- 71/ Generally, Stevens, supra, ref. 3 Ch. VI pp. 97-121.
- 72/ Ibid. p. 97.
- 73/ Ibid. p. 104.
- 74/ Ibid. P. 104.
- 75/ Ibid. p. 104.
- 76/ See T.C. Schelling, "Bargaining, Communication, and Limited War", The Journal of Conflict Resolution, 1: 19-36 (March, 1957) referred to by Stevens in Strategy and Collective Bargaining Negotiation, supra, ref. 3 at p. 108.
- 77/ Supra, ref. 3 at pp. 111-13.
- 78/ See, Walton and McKersie, supra, ref. 46 p. 5.
- 79/ This fact was one of the main reasons for the Walton and McKersie study. They are of the view that in reality the negotiation process was a complex inter-relationship of several sub-processes and their book, A Behavioral Theory of Labor Negotiations, attempts to trace the inter-relationship, complexities and dilemmas which result from collective bargaining negotiations in this broader perspective.

- 80/ Stevens, supra, ref. 3 at p. 120.
- 81/ For an excellent discussion see Walton and McKersie, supra, ref. 46, chapters 8 and 9.
- 82/ It can be seen as undesirable in that it deprives the union leadership in being seen as 'bringing home the bacon' and doing their job. Also, arbitration can put the labour-management relationship into a fighting context which can be damaging to morale and productivity.
- 83/ This would follow if Stevens's suggestion that negotiators are often prone to "save something" for a strike is correct.
- 84/ Stevens, supra, ref. 4 at pp. 46-47.
- 85/ Ibid. at p. 50.
- 86/ This device of putting the issue in a negative form can de-emphasize the problem of polycentricity and correspondingly render possible the development of criteria of decision that will function tolerably.
- 87/ That is an overstatement. It was tried briefly in Germany under the German Weimar Republic but apparently without much success: see Chamberlain, The Labor Sector (New York, 1965) p. 640-41.

CHAPTER II

INTEREST ARBITRATION IN SINGAPORE

Every industrial relations system is the product of its own economic, social and political development and environment, a fact rendering indiscriminate adoption of any other system hazardous at best. Singapore's industrial relations system is no exception. The product of a small and only recently independent South-East Asian nation, traditionally largely dependent on an entrepôt trade in an uncertain international community, its industrial relations system is not tailor-made for North American imitation. It does merit serious examination, however, if for only one reason: Singapore has experienced seven crisis-free years of collective bargaining with a form of interest arbitration available when negotiation does not lead to agreement. In order to make any assessment of their relevance for use in other industrial systems these processes, however, must be seen within the context of their industrial relations system and within their overall environment.

SINGAPORE'S INDUSTRIAL RELATIONS SYSTEM

Singapore is a 225 square mile island separated from the southern tip of the Malay Peninsula by a causeway less than a mile in width. Modern Singapore, founded by Stamford Raffles in 1819, because of its excellent

harbour and strategic location, has served the British as a base for its South-East Asian trade for 140 years. 1/

There were fewer than 10,000 indigents when Raffles arrived but the need for labour soon turned it into a centre for immigration. For 100 years Singapore was the centre of the distribution of Chinese labour throughout the British and Dutch territories. It became predominantly a Chinese city and the commercial capital of the "Nanyang" Chinese who have played such a crucial role in the development of South-East Asia. By 1965, 75% of Singapore's 1,850,000 population was Chinese; of the remainder, 14% was Malay, 8% Indian and Pakistani, and 3% other races, mostly Eurasian and European. The population is young — 70% are under 30 years of age — and growing at one of the fastest rates in Asia — 3-4% annually. 2/

The year 1942 marked the beginning of the end of the British Colonialism in Singapore. 3/ Not only did the Japanese conquest tarnish the British image but the occupation gave local leaders an opportunity to prove their ability to run the country and this ignited a nationalist fervor. The British, realizing this, took steps and made plans as early as 1946 to effect the transition to independence. 4/

The dry detail of the establishment of a legislative assembly and elections does not, however, tell the real story of the first post-war decade. 5/ The real politic in Singapore was the struggle against colonialism. It united the non-communists and the communists and the medium of dissent was largely industrial strife. The trade unions were the only potent local organization apart from the civil service. Both were exploited for the same end — to hasten the departure of the British. The Malayan Communist Party was the only significant political organization functioning. Its leaders

and the non-communist nationalists joined in obtaining the support of the trade unions and loyalty of the civil service. The industrial strife of the early '50's did achieve monetary gains for the rank and file. But this was just a by-product for the major purpose was to render Singapore ungovernable by the British. 6/

The battle was virtually won by 1955 and the second decade witnessed a struggle against communism. Again, the major battleground was in the industrial trade unions. The People's Action Party (P.A.P.) was formed in 1955 by the active nationalists. The non-communist leaders were on the front line of the P.A.P. but their communist colleagues gave it its depth and organizational strength. 7/ From 1954 through 1961 the bulk of the cadre of the P.A.P. were communist oriented trade unionists and student leaders from the Chinese schools, people who had a rapport with the masses and who possessed organizational qualities par excellence and the 1959 elections saw the P.A.P. win a convincing victory and form the first real legislative assembly.

The "crunch" of the struggle came in 1961, ostensibly over Prime Minister Lee Kuan Yew's championing of "merger" with Malaya. The party split: 60-70% of the cadre formed a new party, the Barisan Socialist. 8/ The P.A.P. majority in the legislative assembly was reduced to one, and simultaneously the left wing unions split and formed their own federation, the Singapore Association of Trade Unions. Backed by the P.A.P. a rival federation of unions, the National Trade Union Congress (N.T.U.C.), was established and the struggle developed on two closely connected fronts, politically and industrially. Sukarno's confrontation of Malaysia provided an excuse to detain the communists in Singapore. This was done in 1963 and as a result

today the Barisan Socialist is largely impotent and the strength of the Singapore Association of Trade Unions (S.A.T.U.) severely drained. Since 1965 Singapore has been essentially a one-party state with the trade union movement, at least the central body, the N.T.U.C., strongly influenced by the party, the P.A.P.

Traditionally Singapore's economic well-being has been dependent on its entrepôt trade and the British bases. 9/ Estimates vary, but until recently at least 40-50% of Singapore's G.N.P. derived from trade 10/ and 15-25% from servicing the bases. 11/ In 1965 only 15% of the G.N.P. was supplied by primary and secondary industry and most of this was consumed internally. 12/

The events and pressures of the past 10 years, however, have required Singapore to change in order to survive as a nation both economically and politically. The rapidly increasing population and labour force required more jobs. Unemployment is conservatively estimated at 12-15% 13/, with more than 20,000 new entrants coming into the employment market annually. The British bases are being phased out, and confrontation by Indonesia together with separation from Malaysia coupled with growing protectionist policies have harmed Singapore's entrepôt trade. Rapid industrialization is urged as the key to survival, hence the current drive to industrialize.

Investment in fixed capital assets rose from M\$138 million in 1960 to M\$474 million in 1965, from under 7% of the national income to approximately 15% by 1965. 14/ The government has established an industrial estate at Jurong and allocated M\$50 million for its development. Plants to subsidize "Pioneer Industries" have been implemented which include low-interest loans and a 5-year tax holiday. By the end of 1965 there were 95 pioneer firms

in production, while another 30 were in various stages of preparation to begin production in 1966. The pioneer firms provide direct employment for 10,500, and with a total investment of M\$203 million they account for an output of M\$320 million. 15/ The projected development rate, however, has not been fully realized, due in large part to the separation from Malaysia and the consequent loss of an effective common market. And there are more dark clouds on the horizon, for to develop new external markets to replace the internal ones, Singapore must compete with other low wage countries with long head starts such as Japan, Hong Kong and Taiwan. 16/

The political leadership and government bureaucracy are the dominant industrializing elites in Singapore. This is not surprising in view of their central role in the struggle for independence, the necessity of government planning and initiative in the drive to industrialize and the physical size of the island. The trade union elite and management elites are strongly influenced and overshadowed by the political leadership, a leadership that is modern, British trained, efficient, honest, and determined to achieve its goals. Furthermore, given this and the overriding urgency to industrialize, it is not surprising to find that the common ideology of the industrial relations system is defined most explicitly and frequently by the political leaders.

Their message is that Singapore faces a political and social crisis if she does not industrialize. To industrialize she needs to attract capital and entrepreneurs, and for this she needs to develop as a more or less free enterprise system. To do so successfully will require social peace, industrial peace, sacrifices by the citizens, a spirit of drive, perseverance and ambition within a strong political framework. Furthermore, racial

tolerance will be necessary to survival in the multi-racial international environment, and all of this is to be achieved by "social-democracy" where the role of the state is to consider the interests of all and be committed to the correction of economic inequalities. To a large degree these aims are shared by management and the trade unionists in Singapore although the latter remain firmly committed to protection of the workers' interests and freedom of collective bargaining. 17/

The modern trade union movement in Singapore can trace its beginnings to the old Chinese secret societies. 18/ These societies developed first into guilds and then evolved into worker associations. The Clerical Union, founded in 1920, was the first to be known as a union but by 1940 there were approximately 50 in active operation. The Japanese occupation forced them underground where, under the auspices of the Communist Party, a Trade Union Federation was formed and it became the centre of resistance to the Japanese. V.J. day brought this organization back into full view. The Communist influence in the unions was lessened by the Emergency in Malaya but the trade unions in Singapore bolstered by leaders like Lee Kuan Yew continued to activate for both industrial and political ends. The unions have continued to grow and are now highly developed organizations. Today in Singapore there are 108 registered unions with over 150,000 members and with most of the membership concentrated in a few large industrial unions.19/

In 1959 all unions belonged to the Trade Union Congress which solidly backed the People's Action Party which swept into power that year. In 1961 when the P.A.P. split, the pro-communists formed the Barisan Socialist Party, and the T.U.C. was left a hollow shell. The pro-communist trade unionists set up their own organization, the Singapore Association of Trade

Unions. The P.A.P. sponsored a rival federation, the National Trade Unions Congress and the 7 year struggle for members began. With government support in many ways, the N.T.U.C. was triumphant, and today it is the sole official trade union federation, representing well over 80% of Singapore's trade unionists.

As a general rule the trade unions power is concentrated at the headquarters level. 20/ Branches do not wield much authority. Decisions and their implementation are most often carried out by a few officials at the headquarters rather than at a branch level. One obvious reason for this, of course, is the physical size of the island.

Internal affairs are officially regulated by the Trade Unions Ordinance of 1941. The chief functionary established by the Ordinance, the Registrar of Trade Unions, is given broad discretionary powers regarding the registration and de-registration of trade unions. Unions must file reports with him annually and, as well, officers of trade unions must not have criminal records, nor can they be non-citizens without special leave of the Minister for Labour. 21/ Apart from this, however, union affairs are left to the unions, de jure, although in fact government surveillance of unions, particularly those in the S.A.T.U. group is common.

Officially, today there is only one national federation of unions, the National Trade Unions Congress. It is government supported, morally and financially, and its leadership is closely identified with the People's Action Party. There is some rivalry, however, from the de-registered S.A.T.U. group of unions. From 1961 through to 1965 the rivalry was open and alive. Since 1965, however, the N.T.U.C. unions have taken over the representation rights of most of the S.A.T.U. unions and in 1964, the

S.A.T.U. unions were officially listed as having about 33,000 members, 1/5 of the total trade union membership. This number has since decreased considerably. Official statistics, however, can be misleading and the "potential of the left" at least remains an ever present threat to the N.T.U.C. and its member unions.

The Trade Union Ordinance of 1941 provides legal machinery for the establishment of trade unions and thereby has given them legitimacy. It was not until 1960, however, that they acquired a right to represent workers in dealing with management. Indeed, it was only in 1966 with the passage of the Industrial Relations (Recognition of a Trade Union of Employees) Regulations that this right was clearly established. Now, where a trade union represents a majority of employees in a particular grouping or bargaining unit the union must be recognized and bargained with by the employer. 22/

The basic relationship between worker associations and management is as defined by the Industrial Relations Ordinance, the Regulations, and by their agreements; and it basically assumes a posture of conflict. In 1963, a Joint Consultative Council was established with representatives of management, labour and government to soften this position but it has yet to become active.

The direct relationship of trade unions to governmental agencies is really a matter of the relationship of the N.T.U.C. to the P.A.P. as the S.A.T.U. group of unions have been constantly under attack since 1961. The government has built a Trade Union Conference Hall and established a Labour Research Unit for the N.T.U.C. and it has supported both financially. Furthermore, the Labour Research Unit is staffed by civil servants and the

senior ones exert a powerful influence over the conduct and policy of the N.T.U.C.

The Trade Union Ordinance of 1941 provides for associations of management as well as associations of workers and in 1966 there were 55 such unions in existence. Only two of these, however, are concerned with industrial relations — the Singapore Employers Federation and the National Employers Council. The older of the two, the Singapore Employers Federation was founded in 1948 and by 1964 had about 340 members employing about 42,000 persons. 23/ The National Employer's Council was established in the middle '60's. It tends to be made up of local employers, particularly those involved in Pioneer Industries. The objectives of the Federation (and also of the Council) are to: "(1) Advise members on industrial relations; (2) Appear in the arbitration courts on behalf of its members; (3) Advise upon forms of collective contracts between members and employees; (4) Encourage and undertake by arbitration, conference, or similar procedure, the settlement of disputes either between members or between members and employees; (5) Represent the members, or any one of them, in any trade dispute in which they, or he, may be directly or indirectly interested, including representation on any wages, conciliation, or other board authorized by any law in force in Singapore; and (6) Promote or oppose legislative and other measures which affect or are likely to affect employers engaged in or connected with industry or trade." 24/ The Singapore Employers Federation has five industrial relations officers who are constantly involved in the various facets of industrial relations for the member firms. The National Employer's Council uses a firm — Management Consultation Services — to do its industrial relations work and there are 3 full-time M.C.S. industrial relations officers.

These organizations tend to centralize industrial relations policy and decisions in the private sector as most major industrial relations decisions are in the hands of or under the supervision of a few people. The effect of this is that "leadership" and "test cases" are more readily discerned and created, at least in the private sector. Although bargaining and industrial relations in Singapore appear on the surface highly decentralized — agreements and awards generally relate to one employer or one plant — these organizations along with the N.T.U.C. operate as strong centralizing forces.

There does not appear to be a close relationship with established managements and governmental agencies. There is very little evidence of governmental involvement with management, which is consistent with the view that the government's program of economic development and the attraction of foreign capital are best served by leaving management to its own devices and to the profit motive supplemented by regulation through a tariff and tax policy. Furthermore, governmental agencies employing labour often provide a lead in industrial relations policy but this again is done without direct intervention.

The Economic Development Board, however, in granting assistance to pioneer industries, financial and otherwise, does influence management. Again, however, the goals of government tend to be those of the managements of these firms and it would appear that the availability of the relationship for influence has not as yet led to great influence. At best, it can be said that the Economic Development Board attempts to shelter and foster the new industries.

The public sector employs about 30,000 union members and it operates autonomously through the Treasury. The Treasury, in effect, is the management organization of the public sector and it plays a significant role in influencing labour relations and wage policy generally by virtue of its size and central position. In the early days, government departments and governmental agencies provided a lead in granting increased benefits and higher wages as part of a program of support for friendly N.T.U.C. unions. Of late this friendship has diminished and the public service is providing a new leadership for governmental policy — a policy of restraint and economy. As a result there has been increasing friction between the government and its union wing.

Summary

The political and economic history and the relationship of the N.T.U.C. trade unions with the P.A.P.—government must be taken into account in any assessment of the operation of interest arbitration and collective bargaining in Singapore. There has been no strong independent trade union movement. Politics and trade unionism have always gone hand in hand with the politicians almost always having the upper hand. And since taking power in 1959 the P.A.P. has played a significant and influential role in shaping the industrial relations system and policies in Singapore. For several reasons, Prime Minister Lew Kuan Yew's political goals and the industrial goals of the trade unions until a year ago have been complementary and consistent. Recently, however, with new economic pressures on the island there is evidence of governmental efforts to curtail trade union activity, at least in the area of wage increments.

This intervention stems directly from Singapore's economic vulnerability and needs. Of overriding importance to survival is the need to present a stable political and industrial face to the rest of the world. Only by doing this and keeping its industrial capacity competitive can Singapore hope to attract sufficient foreign capital to provide employment for its population. The entrepôt trade and the Royal Navy are no longer reliable sources of income. With the rapid growth of its population and with no natural resources, Singapore desperately needs to industrialize rapidly and its leaders are convinced that almost all other goals must be regarded as secondary.

The trade unions, as well as being under close surveillance of the government and P.A.P. leaders, are not solidly financed and they depend upon governmental assistance. Furthermore, they are not well nor adequately staffed by comparison with their management contemporaries and by North American standards. This tends to make their role and participation in the process of bargaining and arbitration less valuable as exemplifying what one would expect in countries where trade unionism is strong, well staffed and enjoying a quite independent position and power base.

But these qualifications are not wholly negative. Up until a year or two ago, union activities in industrial relations were left relatively free. The money and assistance they received from the government gave them strength and some of their top leaders were men of ability. Thus, the experience of Singapore's Arbitration Court up to 1967 and the collective bargaining practised in Singapore do merit serious consideration and analysis. The Industrial Relations Ordinance of 1960 did establish a system that has combined arbitration and bargaining and it has enjoyed a remarkable degree of success.

THE LEGISLATIVE FRAMEWORK OF THE
INDUSTRIAL RELATIONS SYSTEM

While the British governed Singapore, quite understandably the legislation relating to industrial relations was essentially British. It was not until the late fifties, on the eve of independence, that the framework of the industrial relations system as it operates today came into being. Until 1957 the only labour legislation in effect, apart from the Trade Unions Ordinance of 1941, was the Trade Disputes Ordinance, the Criminal Law (Temporary Provisions) Ordinance, the Workman's Compensation Ordinance, the Central Provident Fund Ordinance and the Labour Ordinance. All of these, with the exception of the Trade Disputes Ordinance, were passed in 1955 partly in response to the demands of organized labour at that time.

The general effect of that legislation was to legalize but leave union activity largely unfettered. Part IV of the Trade Unions Ordinance exempted registered trade unions from tortuous liability connected with strike activity, by implication leaving trade unions with a "right to strike". In 1955, however, this was cut back somewhat by the Criminal Law (Temporary Provisions) Ordinance which disallowed strikes in essential services until a six weeks period following official notice had expired. Generally then, until 1960, collective bargaining with a right to strike was the backbone of industrial relations regulation. It was not until 1960 when the People's Action Party introduced the Industrial Relations Ordinance in fulfillment of their election pledge to bring "industrial peace with justice" to Singapore that the industrial relations system as it is known today took form.

1. The Industrial Relations Ordinance

The draftsmen of the Industrial Relations Ordinance, 1960, 'painted with a broad brush'. Most aspects of the trade union-employer relationship are covered by its provisions. The Ordinance established a framework for collective bargaining from the inception of collective bargaining negotiations through collective agreement administration. Indeed now, from the moment that a trade union comes upon the scene, both the union and the employer involved fall under its umbrella of regulation. As well as providing a framework for collective bargaining negotiations 25/, the Ordinance established machinery for compulsory conciliation through the office of the Commissioner for Labour. 26/ To give substance to the desiderata of stability, it established procedures for the registration and enforcement of collective agreements. 27/ To provide for dispute settlement if collective bargaining fails to produce agreement, the Ordinance created the Industrial Arbitration Court and gave it the power to make binding awards. 28/ To deal with disputes during the currency of agreements and awards, it provided for submissions to referres 29/ and for applications to the Industrial Arbitration Court for interpretations and variations of their terms. 30/ Finally, to prevent anti-union conduct, it established a number of "unfair labour practices" enforceable in the District Courts. 31/

Although the Ordinance was modelled upon the arbitration legislation of the State of Western Australia 32/, and although the bulk of its provisions dealt with the establishment of the Industrial Arbitration Court 33/, arbitration was not intended to be a mainstay of the regulatory scheme. It was designed to realize the aim of stable, ordered, industrial relations, primarily through private collective bargaining as was its American counter-

part, the National Labor Relations Act. 34/ The legislative history of the Ordinance clearly shows that collective bargaining and not arbitration was intended to be the foundation of industrial relation in Singapore. 35/ The predominant view of the proponents of the Ordinance was that if labour and management were required to utilize collective bargaining for the settlement of terms and conditions of employment, industrial strife would be minimized. 36/ Although the provisions of the Ordinance went far beyond the mere establishment of a framework for conducting collective bargaining negotiations, it was intended that resort to conciliation and arbitration would be necessary only in exceptional cases. 37/

The regulatory scheme established by the Industrial Relations ordinance and Regulations can be roughly divided into four related parts. 38/ The first can be designated as "establishing industrial relationships". It is concerned with recognition of trade unions, determination of the appropriate units of employees both for the purpose of selecting a bargaining representative and for the application of any subsequent agreement or award, and succession of trade unions and employers. The second is "collective bargaining"—from the service of an invitation to negotiate, through official and unofficial mediation, culminating in a collective agreement certified by the Industrial Arbitration Court. The third is "interest arbitration", that is, arbitration of disputes over the terms and conditions of employment to be contained in a collective agreement. Functionally, this includes applications for extinctions and variations as well as fresh submissions. The fourth and final division is "the administration of agreements and awards". The main procedures provided by the legislation for dealing with disputes arising out of, and during, the operation of collective agreements and awards are referrals to referees, applications for interpretations, and enforcement proceedings.

(a) Establishment of Industrial Relations

Section 16 provides that no trade union of employees may serve an invitation to negotiate on any employer until it has been given recognition by the employer in the prescribed manner. "The prescribed manner" involves two steps. First, a trade union must serve an employer with a "claim for recognition" in accordance with a Form A and then the employer must accord recognition to the trade union in accordance with Form B of the Industrial Relations (Recognition of a Trade Union of Employees) Regulations, 1966. The employer, however, does not have to accord recognition to any trade union serving him with a "claim for recognition". He is free to do so. But an employer is under no legal obligation so to do except in the situation where the majority of his employees are members of the trade union as determined by a secret ballot. The Industrial Relations (Recognition of a Trade Union of Employees) Regulations set up the machinery for conducting such ballots and Section 4 (4) provides that "the employer shall, if the results of such secret ballot show that the majority of the employees entitled to vote are members of a particular trade union of employees, give recognition to such trade union within three working days of the receipt of such results". Once a trade union has been accorded recognition it is empowered to serve a Section 17 invitation to negotiate. If the negotiations result in either a collective agreement or an award of the Court it becomes binding on the parties and any successors to the parties by virtue of either Section 25 or 38 of the Industrial Relations Ordinance.

(b) Framework for Collective Bargaining Negotiations

Section 17 provides that once a trade union of employees has been recognized it may serve, or be served with, an invitation to negotiate.

This is the initiating step for collective bargaining negotiations. This invitation may or may not be accepted but if it is, then negotiations begin. If it is not accepted within seven days the party serving the notice may notify the Commissioner for Labour and thereby call in third party conciliation. Conciliation may also be initiated later should negotiations reach a deadlock.

If negotiations culminate in a collective agreement then a memorandum of its terms must be forwarded to the Industrial Arbitration Court for certification. The agreement must be for a term of at least eighteen months and not more than three years. It must contain a term providing for the reference of disputes arising out of the operation of the agreement to a referee. The Court may in its discretion refuse to certify the agreement if it is of the opinion that it is not in the public interest, or if its terms are inadequate. 39/ The Court may also require the agreement to be amended to comply with the provisions of the Ordinance Regulations or any other written law, before granting certification. 40/

The authority given to the Court by Section 24 is potentially quite pervasive. The Court's exercise of the power, however, has been primarily to ensure that no violations of the legislation are contained in the terms of agreement and that they adequately express the agreement reached. The Court has, as a matter of policy, refused to allow terms that attempt to limit the benefits of the agreement to union members only and just recently in Collective Agreement No. 20 of 1966, it ordered a hearing and directed the deletion of a term giving the employer the right to forfeit payment of a service benefit if an employee resigns after ten years' service without giving due written notice. This case, the McMillan and Company Limited

case, 41/ represents the only major exercise of the Court's discretionary power under this Section of the Ordinance.

(c) Interest Arbitration

As has been mentioned, "interest arbitration" is the arbitration of disputes over the terms and conditions of service to bind an employer and his employees for a future period of time. The basic source of this kind of arbitration is by way of Section 30 submissions or referrals to the Industrial Arbitration Court. These may be by agreement of the parties, by direction of the Minister for Labour or by proclamation of the President of Singapore. 42/ Other sources of interest arbitrations come from applications for extensions of existing agreements or awards or fore variations in existing agreements or awards.

In such cases the Court is directed to carefully and expeditiously hear, inquire into, and investigate the dispute and determine it by arbitration. The Court is given wide powers both as to the procedure of the arbitral hearing and as to the criteria of decision. It is simply required to "act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms". 43/ As well, in determining a trade dispute, the Court may have regard "not only to the interests of the persons immediately concerned but to the interests of the community as a whole and in particular the condition of the economy of Singapore". 44/

(d) Administration of Agreements and Awards

Once an agreement is certified, or an award is made by the Court, containing the terms or rules to govern the parties' relationship for a set

future period of time, the Industrial Arbitration Court dons another hat and serves as the final arbiter of disputes arising out of the operation and during the currency of such agreements and awards. It is not the only dispute-settling agency as all agreements must provide for such disputes to be referred to a referee. But the Court is the final court of appeal from referee decisions, as well as having primary jurisdiction to hear and determine applications for enforcement, interpretations, and dismissal and retrenchment disputes originating under Section 30. These administrative disputes make up by far the largest number of cases dealt with by the Industrial Arbitration Court.

2. The Industrial Disputes and Related Ordinances

The Industrial Relations Ordinance did not supplant the existing legislation regulating trade union activity. Rather the new and the old were interwoven. Strikes taken while a dispute was within the cognizance of the Industrial Arbitration Court were made illegal and subject to criminal prosecution. Thus, the use of economic force to assist in collective bargaining negotiation is not interfered with unless and until the particular dispute is directed to arbitration. Although this proscription has on occasion been broken, generally, there have been no enforcement difficulties.

Recently, however, legislation has been passed further reducing the opportunity and manner of the exercise of economic power. The Trade Unions Ordinance was amended to provide that a majority of members of a union must consent by way of secret ballot to any industrial action including "the adoption of any practice, procedure or method in the performance of work which would result in a limitation on output or production in any occupation, service, trade or industry or business". In addition, tighter controls were

enacted in connection with the public service and essential industries. The list of essential industries was further extended to include banking and broadcasting as well as the more familiar public services of electricity, gas, transport and water. These new legislative provisions indicate a gradual shifting of governmental policy to a position that does not accept the use of strike action. The record of strikes in Singapore of late further reflects such a position by government. 45/

3. Social Legislation

In the 1950's certain features of the employer-employee relationship were directly the subject of legislation which is still in operation. The hours of work, terms of notice, overtime provisions, etc. became the subject of minimum terms by virtue of the Labour Ordinance, the Clerks Employment Ordinance and the Shop Assistants Employment Ordinance. 46/ The Legislation has had some importance to industrial relations in Singapore, not only in providing minimum terms generally, but also in providing standards and criteria which have to a considerable extent been adopted by the Industrial Arbitration Court and incorporated into its awards. It will be this aspect of the Ordinances' effect that will be considered.

INTEREST ARBITRATION

1. The Arbitral Procedure 47/

On its surface, the procedure of the Industrial Arbitration Court is similar to that of an ordinary court of law. The proceedings are of an adversary nature and the responsibility for their conduct is primarily that of the parties. The Court's jurisdiction can be instituted by the parties either by joint submission or by application for an extension of an existing award or agreement. Of course, as mentioned, the Minister of Labour and the President of Singapore can submit disputes to arbitration and thereby compel

the disputants to participate in the process. The party making the claim carries the burden of the case but both parties are given wide latitude to present whatever evidence and argument they please.

Generally, however, in interest arbitration cases (as distinct from cases applying the terms and conditions of an agreement or award to a particular factual dispute) evidence is rarely adduced through witnesses, examination and cross-examination. In the great bulk of the interest arbitration cases the "facts" are simply stated by the advocates and strung throughout their "argument". The rules of evidence and proof are quite naturally disregarded. Generally the "evidence" takes the form of "background fact", "financial information", and references to existing collective agreements and awards. Evidence of the history of pre-arbitration negotiation is forbidden except with the consent of the opposing party 48/ although the tripartite character of the Court panel tends to make this rule somewhat porous.

Lawyers are not permitted to act as advocates in the Industrial Arbitration Court. As a result, both the trade union movement and organized management have developed "lay" advocates. Partly for this reason and partly because of the amorphous nature of the process the hearings tend to be lengthy. Often the transcripts will run to several hundred pages.

It is generally accepted by the advocates appearing and arguing the cases before the Court that their most useful and effective role is to prepare and equip their organization's representative on the Court panel with the best bargaining positions possible. Occasionally, the arguments are developed indiscriminately, sometimes because of a lack of sophistication, sometimes as a security device in much the same way as the "large initial demand" is used. Experienced advocates, as well, will tactitly direct

themselves to the chairman, the President or Deputy-President as the case may be. That is, they will attempt through argument to signal what terms they will accept as bargainable and also what quantum would be acceptable in the final result. The argument here is really a sophisticated form of bargaining communication. The transcript of proceedings in the recent Chartered Bank case provides a clear example. There, several items were in issue, some involving new departures and the quantum of the bonus. In argument, the Bank's advocate strongly opposed any change on any items but on a careful reading of the transcript he intimated to the Court that if something had to be conceded the most acceptable concession would be in the quantum of bonus. 49/

Rarely is the hearing used to attempt "rational" argument of pre-existing criteria. Often "comparable" items in collective agreements and awards are referred to but in many cases this only brings forth a mass of inconsistent and uncertain data. In cases in which one or other of the parties has refused to come to agreement along the lines of a clearly established pattern in the industry, then argument based on "comparability" can be said to be "rational". But in these cases it really only amounts to first establishing the norm then making an argument that there is no reason warranting a departure from it.

Trade unionists often utilize arbitration hearings as platforms for their intra-organization purposes. Particularly in public service cases, the trade union advocates often indulge in a display of histrionics intended for their members' consumption rather than influencing the outcome of the particular dispute.

Some further corroboration for the judgment that the argument of the

parties in interest arbitration cases has very little direct influence on the final decision is found in the form of the Court decisions. In a few early cases the awards were accompanied by elaborate attempts to give justifying reasons. These became a source of constant embarrassment and ridicule and were soon abandoned. Now decisions merely state that the arguments of the parties were carefully considered followed by statement of terms and conditions making up the award. On occasion the President has taken pains to state that they did not feel "bound" by any past decisions but rather that they would be influenced by the particular economic and other factors operating in Singapore at the particular time. 50/

In sum then, the process of arbitration from the point of view of the participation of the parties to the dispute is only in "form" adjudicative. Although adversary in nature, the argument and evidence tend not to be mainly directed to a "right" or "wrong" decision. Rather, it is used to arm the representative panel members, shield them for a prejudicial position, and occasionally to signal concessions that would be acceptable. On occasion, the Court has been known to demand a clear statement from the advocates at the hearings as to what they would accept as an award. The fact that the argument is not a meaningful form of participation in the sense of reasoned argument, appealing to governing criteria of decisions is supported by the Court's style of decision. It makes no attempt to give written reasons for its decisions. The written decisions are simply a statement of the terms and conditions making up the award.

2. Tripartitism

In all "interest arbitration" cases, the Court is made up of a chairman, either the President or the Deputy-President and a representative

selected from the "Employer's Panel of Members" and a representative selected from the "Employee's Panel of Members". The so-called "panel" members are nominated by the employer associations and central trade organizations and appointed by the Minister of Labour to one year terms. The representative members are chosen by the parties for each case from the panels. Only where a selection cannot be made will the President appoint a panel member. 51/

The decision of the Court is by a majority. If no majority can be attained then the decision of the President prevails. 52/ In the past seven years there has only been one or two cases where the representative members have made up a majority and only one or two where the President or Deputy-President has had to make a decision singly. Much of this can be explained by the personnel of the Court in the position of President and Deputy-President and by the institutional pressures operating under the system.

In interest arbitration, although there are mixed views as to the role of representative members, the decision process is clearly not adjudicative. It is rather a species of negotiation. The bargaining is somewhat distorted because of the "public" or "official" status given the panel members but from interviews with most of them, past and present, they concede that their role is primarily that of a negotiator.

Bargaining or negotiating power in this institutional structure has various sources. Perhaps the most important is the President's acute sensitivity to the "acceptability" of the Court and its decisions. The first President did not seem to share this awareness and it is agreed that his insensitivity contributed to his demise. The sensitivity of the Court stems as well from a realization that the decisions cannot support themselves, partly because of the critical "legislative" nature of the decisions and partly because of the political vulnerability of the institution. This gives the panel members a sort of "coercive" power. But the symbiotic

nature of the panel member-President relationship and the President's ability to side with one or the other gives him a source of "coercive" power as well.

With these power bases it is quite commonplace to find all members adopting strategies and tactics directed to working out awards. Persuasion and "tactics of persuasion" become most predominant for the panel members and they have the "third party" to operate upon which gives their efforts more meaning. In many cases arguments and opinions of the acceptability of a proposed result "to the trade union movement", "to the employers' association" and "to the government" form the strongest persuasive arguments. The representative members often use the threat of a dissent or a minority opinion as tools of "coercion". On only one occasion has a representative member threatened resignation—his ultimate weapon.

One good example of a mix of tactics along these lines again is furnished by the Chartered Bank case. 53/ In that case the President drafted a tentative award in which nothing at all was awarded to the union. The union representative on the panel met privately with the President and urged strongly that the Court would lose all its support from the trade union movement if this award were issued and that as a minimum concession the bonus had to be raised. In the final result the quantum of bonus was raised to two months.

On the other hand, the panel members are constrained by the continuing nature of their office to not becoming intransigent in their positions. Most panel members have occasion to require Presidential support either in cases of their own or in other arbitration cases. This operates to encourage exchange and compromise. On the other hand, at least from the union point of view, the panel member's continued tenure depends upon his

own acceptability in the trade union movement generally. To a certain degree this operates as a check against too much "independence" and a position of neutrality on the part of the representative members.

The public sector cases form one major exception to this description of the operation of the tripartite arbitration decision process. In these, the panel member representing "management" must be a "Treasury" appointee. These members are almost always senior civil servants and they are directly responsible to the Minister of Finance. As a result either through prudence or by direct order, their positions are usually inflexible and they adamantly support the Government's final negotiation position. These representative panel members frankly admit that they do not have much leeway in the positions they can take in post-arbitral hearing discussions and rarely do they concur with the President. The President is constantly put in the position of having to bear the primary burden of decision and as a result in these public cases the system is strained to the utmost.

Now viewing the process of decision temporally, the initial post-hearing panel discussions tend to be more in the nature of information seeking exercises than bargaining. The full mix of persuasion tactics is utilized by the panel members with little or no resort to coercion or commitment tactics. The President at these early discussions generally adopts a passive role allowing the representative members to set forth their positions. As discussions continue, exchange and reciprocity are encouraged and directed by the President. Uncontentious matters are isolated and agreed upon. The President usually tries to move the equilibrium positions somewhat and get alternate proposals until some workable position develops. At this time commitment tactics come into play with expressions of dissent and disagreement put forward by the representative members. If any time limit is imposed it is done by the President as he sees fit.

The obscurity of the "proper" role of the representative members on the employer's and employee's panels could be either a strength or a weakness of the Singapore system. On the one hand the representative members see themselves as partisan negotiators and on the other hand they are under oath to act impartially and make fair decisions. Nevertheless, it seems to work. And both trade unionists and employers alike see the ideal representative member as one who knows when to get tough but who is also discriminating and one who has the respect of his counterpart as well as the President. Perhaps the realities of the situation keep the partisans truly partisan but their oath of office shields them from bearing full personal responsibility in the eyes of their constituent organizations. One thing that is universally agreed upon, however, is that the Industrial Arbitration Court would never have achieved the degree of respect and acceptability that it enjoys, indeed would probably have been unworkable, if the tripartite form of decision-making had not been adopted.

It is the consensus of the panel members that the system functions well at present largely because of the skill and tact of the present chairman. They make comparisons with the first President and conclude that the much greater sensitivity of the present President to the inner pressures and to the nature of the decision process has been one of the most important factors in the success of the present system. The one almost universal complaint is that the Court is too slow. For this, the institutional procedures are largely to blame. Hearings can only take place when both representatives are free to be present. All of the panel members are part-time only and their schedules only allow a certain amount of their time for the Industrial Arbitration Court. This delaying factor is carried through to the post-hearing discussion and negotiation with the result that major awards

can take well over a year from the date of the first hearing to the release of the decision by the Court. Of course, this delay operates as a "cost of arbitration".

3. Criteria of Decision

From the argument of the parties, comments in the written arbitration awards and from the actual results of the cases it is possible to identify some criteria of decision operating in the Industrial Arbitration Court's handling of interest arbitrations in Singapore. Most decisions will carry this sort of effect and at one time or another there have been references to at least five different criteria: ability to pay; comparison with others; productivity; cost of living; and the state of the national economy. 54/ But, in no case has the Court defined any of these with any precision nor has it rationally developed the application of any or all to any particular issue or dispute. Hence, it would appear that at best these factors and the underlying economic data received and do receive "consideration" by the Court but that is all. There is no attempt to use them as basic principles guiding decision in any consistent objective way. 55/

This is understandable in light of the institutional structure of the Court. Its tripartite character makes consistency and reasoned application haphazard. In the first place, the nature of the decision process tends to be a form of negotiation. Secondly, although the presence of the President and Deputy-President provides continuity, the representative members are constantly changing and this tends toward a lack of uniformity. Nevertheless, Professor Chalmers postulates that the representative members are cognizant of the past decisions of the Court and that they look to these as basic guidelines in the decision process. 56/ The frequency of unanimity in the decisions of the Court tends to confirm this observation.

At least for the past few years, the Court has not given reasoned decisions. Indeed, it has often commented that its decisions are of no "precedent" value and are not to be regarded as "binding" in future cases and this makes any attempt to spell out criteria of decision somewhat more tenuous and speculative.

Finally, the size of the sample examined is small 57/ and it spans a period of time that has witnessed rapid changes in the economic condition of the island. Generally, the private and public sectors are of little influence on each other and the developing industries—"Pioneer Industries"—have been treated apart from the established employers. This further limits the sample of cases. And those cases left can be segregated into cases decided under the first President and those decided afterward. In addition, the first President saw his initial task as making the Court acceptable to unionists and in the past few years, with separation and an impending economic crisis, the political effort has been to encourage restraint, all of these factors limiting the accuracy of any conclusions to be drawn with regard to the operating "criteria" in "interest" arbitration cases.

Despite these limitations, however, there are some features of the cases that show remarkable consistency. Particularly in the so-called "fringe benefits" areas, the Court has been quite consistent without saying so in so many words. 58/

(a) Fringe Benefits

The Court was called upon to decide hours of work on ten occasions between 1960 and 1965. In six of those cases the Court followed the minimum

established by the Ordinances, thirty-nine or forty-four hours per week depending upon the Ordinance. In the remaining four cases the Court shortened the hours of work slightly but there was evidence in the record to suggest that the parties had already agreed to the shortened working week or that the employer had conceded the issue in open court.

Overtime rates have a similar history. In ten out of thirteen cases decided between 1960 and 1965 the Court followed the minima established by the relevant Ordinance and in the other three cases it made an award that had become accepted either through past practice or by agreement during the hearing. This pattern continues in the Court's awards dealing with holidays, annual leave, and retirement benefits. Generally, if the issue is contested the Court will adopt the statutory terms. When they haven't done so, there is usually some history of acceptance by the employer or an express concession of the matter.

(b) Wages and Bonus

There are no statutory standards relating to wages or bonus and in this area predictability is less certain. For one thing most "wage" issues have arisen in situations where the employer either is in serious financial difficulty or is a clear pattern follower. In the first situation the guiding criteria is "ability to pay". It is usually applied on the basis of the employer not having ability to pay either the union's demands or the "going rate". In these cases the Court will usually establish wages at something less than a comparable figure although there is no guidance as to what this will be. In those cases in which clear comparability is evident (that is, ones in which the employer is not a pattern setter) wages are usually established on that basis.

This analysis of "wages" however is not too reliable. In the first place, there have been very few cases in which wage rates have been in issue before the Court. Secondly, the establishment of long term scales has become customary in industrial relations in Singapore and the Court has shown itself indisposed to interfering with an existing set of scales without good reason. Thirdly, the practice of giving annual bonuses has resulted in this item being the primary money variable in agreement negotiation and arbitration and this has taken the pressure away from the established wage rates. Thus, at this point of time, in the triennial negotiation of agreements for the second and third times, the critical factor in negotiation and arbitration cases would seem to be the quantum of bonus to be paid.

For a number of years, between 1960 and 1965, there was a general tendency to fix the quantum of bonus at one and one-half months salary. This has been recently altered. In the Chartered Bank Award, regarded generally as a bell-weather and leader in the commercial and financial sector, the Court decided that no change in the wage scales would be allowed but that the bonus would be raised to two months from one and one-half months. In its argument the Chartered Bank refused to argue that it had no ability to pay this amount. The most realistic assessment of the reason for the Court's decision to raise the bonus, however, is that the trade union member on the panel was able to persuade the President that the acceptance of the Court in trade union circles would be seriously damaged if no increase was given to the bank employees.

With this "breakthrough" it is possible to say that for the next few years, especially if the predicted economic difficulties develop, that the Court will strongly tend to determine fringe benefits on the basis of the

statutory minima except where there is agreement or a history of past practice to the contrary and that in the area of wages it will refuse to tamper with "scales" and will not grant more than two months' bonus. In cases in which an employer can demonstrate an "inability" to pay, the Court will continue to be disposed to grant less than comparable wage rates but if there is no "inability" the rates established generally, either by agreement or arbitration, will govern.

Thus, it would appear that some certainty in Court decisions is developing. This has only come about in the past year or two, however, and even now is not absolute by any means. Indeed, there can be considerable vagueness as to what a comparable rate is and as to when an employer is "unable" to pay any increase or a less than "comparable" wage increase. However, the range of indeterminateness or uncertainty has lessened.

4. A Source of Confusion

As mentioned, the Industrial Arbitration Court performs a range of functions including the determination of disputes over representation rights and disputes arising out of the operation and application of collective agreements including disputes over the meanings of agreements and awards and discipline disputes. All of these are handled in the same way, by tripartite arbitration with only a few exceptions. And from discussions with panel members it is in these cases that criteria of decision are most meaningful and ones in which intransigence most often occurs in the post-hearing discussion. In these cases, principles and rules tend to turn the discussions into continued advocacy and argument. There appears to be a carry-over effect both ways. Sometimes in interest arbitrations the panel members adopt a similar tack but on the other hand in the adjudicative disputes

there is some compromise and the Court there is hesitant to give reasons and adopt a position of reasoned consistency between cases. Thus, in the situations in which rules and reasoned decisions are appropriate they are only hesitantly developing, whereas in interest arbitration cases, ones in which one would expect the opposite, some criteria are followed and they do function in the decision process.

COLLECTIVE BARGAINING IN THE SINGAPORE SYSTEM

The following is based upon a series of interviews with negotiators representing both unions and management and in particular upon ten case studies of sets of negotiations which came to fruition in late 1966 and early 1967. ^{59/} The purpose of these studies was to develop some empirical data for an analysis of the impact of the arbitration system on collective bargaining. The methodology used was to conduct interviews with the chief union and management negotiators in each set of negotiations separately and then to blend the information into a chronological history of the negotiations. Occasionally this was supplemented with interviews with the mediator involved and where possible by actually sitting in and observing during negotiating sessions. In all cases the information was received on condition that it be kept confidential and consequently none of it has been published in its actual form.

One caution should be taken with regard to the following generalizations based on these data. The negotiations studied took place in 1966 and early 1967. At this time, the social and economical climate was quite different from that of three years earlier. For one thing, most negotiations were based on an existing relationship. The climate politically had changed and the official N.T.U.C. trade unions were not recipients of wholehearted

government assistance. Strikes were generally less feasible than in earlier times and there was pressure for restraint in granting wage increases. Finally, the Court's position on most matters was becoming clearer, at least much clearer than it was three or four years earlier.

1. The Legislative Framework and the Early Stages

The Industrial Relations Ordinance provides that upon receiving recognition a trade union may serve the employer with a set of claims. The employer must either accept these and agree to negotiate or serve counter-proposals and begin to negotiate with a view to establishing a collective bargaining agreement. Where there is an existing agreement, the expiration of the agreement is usually the signal to initiate bargaining.

In every case studied the trade union began with a "large demand". More often than not the employer would counter with a suggestion that the existing agreement be continued with little or no alteration. And generally the rationale given was that the large demand served to satisfy the constituents as well as camouflage the unions realistic goals until it could make some judgment as to what was going to be available.

Again, in almost every case studied the first two or three meetings tended to be exploratory. The union negotiators often made speeches about the rights and needs of the workers whereas the employer representative characteristically would emphasize the difficult times faced by both the island and the company. The following extract is typical:

At the first joint meeting, the company elaborates its position that it has lost some local markets, and it is faced with such adverse price competition in some external markets that it has not been able to expand sales overseas. Already it has been forced to carry out some retrenchment - indeed

perhaps further retrenchment might be necessary. In response to a union demand at this session, the company says that it could not permit the union to "look at its books"; that such an examination of its financial and market position could only be by a government agency, such as the Arbitration Court. 60/

These exchanges in the first meetings, usually when the full negotiating committees were present, were almost ritualistic.

Generally, after the first meeting or two, and once the negotiating teams were reduced to a few, the negotiators established a tentative agenda dealing with the minor fringe items and non-contentious items first, leaving the wages, important fringes and bonuses to the end. The rule of package settlement was invariably adopted (although not always adhered to) and negotiations then began in earnest. The reasons given for this procedure were to attempt to develop an environment of settlement and to build up to the opponent's stake in an agreement. For example, one Company negotiator stated the following:

The Company was happy to work along, in the negotiations, on minor items that could be expected to yield agreements before the parties undertook any active consideration of the stubborn issues of wages and bonus. This would provide the basis for a better total climate in the negotiations, the Company hoped. It would also make clear the concessions that the Company was prepared to make and, on the other hand, the changes on which the Company was insistent. In this total strategy, of course, the Company seeks to protect the position that no tentative agreement was final until all items were agreed upon. 61/

This "package settlement" practice also had the effect of raising the cost of disagreement on the remainder of issues as the negotiations continued, for if arbitration were instituted the whole matter theoretically would begin anew.

The "early stages" of negotiation revealed use of the full mix of tactics-persuasive as well as coercive. A quite typical threat used by company negotiators was a hint that it would either have to retrench its whole operation or mechanize it. Union negotiators frequently alluded to employee dissatisfaction and the possibility of a stoppage. Frequent comparisons were made both to other agreements and to the Court awards. The use of economic data, as might be expected, was largely a tool of the management negotiators. They were usually much better informed than their union counterparts. For example, in one set of negotiations it was found that:

The Company had made an extensive survey of the wage patterns prevailing elsewhere but these had not yielded any very precise results. A major competitor was already at about the same level, but could be expected to follow along on whatever level of increase produced by these negotiations. Some other competitors were small and local and paid wages so far lower as not to be relevant to current negotiations. 62/

The use of more sophisticated economic data was rare and the result of these attempts to use it for tactics of persuasion was mixed except when a company made the argument that increased costs would lead to retrenchment, then they seemed to have an impact.

The union negotiations were particularly disappointed with the company's no wage increase attitude and were not persuaded by its talk about diminishing markets and comparability and that the company could not afford any increase at all. But its threat to automate in the event of a substantial increase in scale, with the tough employment situation in Singapore, caused them much concern. However, the statistics obtained from the company, while not fully accepted by the union negotiators, served them a purpose in so far as they could use them to convince the membership about the unfeasibility of the original high demands. Indeed, on the basis of the company representation now feels that no general upward revision of the scales was possible although certain anomalies ought to be brought into line. 63/

The employers in particular had their eyes on the past performance of the Industrial Arbitration Court and through the medium of the two employer organizations they were fairly well informed as to what the Court would award should agreement not be reached. This was true of the N.T.U.C. unions, as well, as they had the benefit of the government supported Labour Research Centre as shown in the ABC negotiations where the Union rejected a Company offer in part in the belief that the Court would award a larger amount:

The Union rejection of the small wage and bonus offers was based on the hope that additional offers would be forthcoming from the Company. At least some of the committee also reasoned that they always had an alternative of reference to the Arbitration Court which would be bound to award larger wage and bonus amounts than the Company had offered. On the other hand, the Union was not prepared to insist on its bonus claim at the cost of a wage increase. 64/

The course of negotiations usually developed through several stages of proposal and counter-proposal with a greater use of coercive tactics being introduced as negotiations carried on. These tactics commonly made use of a threat to retrench which had a substantial impact in the context of rising unemployment. Other common tactics were threats to go to arbitration or to mediation. For example, in the Orion-W.W. case 65/ the company negotiator used this threat:

C rejects the company offers but does not make any counter-proposals. Instead he suggests moving to fringes. At this the company shows bitter resentment and threatens arbitration. The company negotiator, L, gives the union a two-week ultimatum to make a counter-proposal. 66/

The use of open and full economic pressure in the form of a strike was not totally absent but because of an increasing governmental desire to prevent strikes and because of the precarious employment situation the real likelihood of a serious stoppage was not present. On several occasions, however,

unauthorized slowdowns and stoppages were used to underscore a threat and the use of economic force could not be wholly disregarded by company negotiators. For example, in one situation the following incidents occurred:

In a short meeting, the Union emphasized their differences on wages but particularly pressed for a bonus concession by the Company. The Company rejected anything further on both points and again proposed a reference to arbitration. The Company position on both wages and bonus was final, but the representative said he would check with the Directors on whether any further change could be made. The Union stands pat and suggests that industrial action may be necessary; the Arbitration Court would take too long. The Company warns that if industrial action is begun, it will certainly turn to the Arbitration Court. 67/

After some further meetings with no change in position by either the Company or Union:

The union members begin a "go slow" in one department and institute a refusal to work overtime. The Company also finds considerable damage to machines, but does not blame Union officials for this action. The Company files with the Arbitration Court for an extension of the old agreement. 68/

When negotiations reached the stage where the important items, usually wages and bonus, had been dealt with, several alternative courses of action developed.

2. Mediation and the Later Stages

If the company believed that a settlement were possible it would usually signify its preparedness to come to an agreement without any resort to conciliator by making a serious counter-proposal. The proposal would generally be below the comparable rates or what the Court would award. Its value primarily was to signify a willingness to move to agreement, then further discussion would usually lead to agreement at a rate and with terms comparable to other firms in the industry or perhaps slightly higher. The general attitude of the company negotiators, particularly those in the management firms, was that if the company could stand it then a slightly better wage rate was more acceptable than a long drawn out arbitration case. The union

negotiators similarly were prepared to accept a rate in line with comparable firms and court awards rather than go through the time, trouble, and expense of an arbitration. In one case both the Company and Union negotiators expressed this view and the Company ended up conceding a half month bonus more than it knew the Court would award for this very reason:

The Union had hoped that they would get as much as they could without having to go to the Court or having to institute industrial action. The Company did not want to get itself involved in the onerous task of preparing for a court case despite the fact that it expected that the Court would award no more than 2 months for a bonus. 69/

If agreement were not immediately available or were felt unwise without "conciliation", either or both parties deadlocked the negotiations and called in the Department of Labour. If this course seemed likely, then rarely did either party show an inclination to modify its position. Usually, when a dispute went to conciliation the parties had not made any serious attempt at agreement. This is understandable. Conciliation is a necessary step to either calling a strike or having a dispute submitted to arbitration by the Minister. Secondly, the power of the Ministry to coerce concessions is considerable and to not have kept something in reserve for this step could be a mistake. To make a substantial concession and not reach agreement would lead to further pressure to concede in conciliation. Finally, if either party were required to concede and thereby either lose face or be harmed intra-organizationally, the device of going to the Ministry helped provide an excuse or rationale.

The conciliators enjoy considerable influence over the parties inasmuch as their reports to the Minister provide the basis of a ministerial submission to arbitration. If the union was weak and desired arbitration

the conciliator would hint that it would not be recommended. If it were strong and did not wish interference with its ability to carry out a stop-page a referral to arbitration would be suggested. Similar tactics are applicable on employers' positions and they have been skillfully applied in varying degrees. Thus, with this power in the conciliator, "going to conciliation" usually resulted in both parties making some concession often to the point of agreement.

A third avenue open was to proceed directly to arbitration by way of an application for extension of the existing agreement. 70/ This can be done unilaterally and it operates to remove the right to strike. 71/ Furthermore, this tactic provides a deadline and either the Ministry of Labour or the Registrar of the Industrial Arbitration Court are available for conciliation if it should prove desirable.

Agreements reached at the conciliation stage generally are made on the basis of comparisons to other agreements and Court awards in the industry. And here there is clear evidence that Court awards or other agreements provide a "convergence mechanism" as Stevens suggested would be the case in the "later stages" of negotiation. Two cases in which negotiations culminated in agreements while the Chartered Bank case was being argued and determined by the Industrial Arbitration Court provide interesting examples of this convergence factor. In one case, where agreement was reached without resort to conciliation, the last and key issue to be decided was the bonus. In this case both the Union and the Company felt that an increase in bonus would be awarded by the Court but they were not sure whether it would be and $\frac{3}{4}$ months or 2 full months. They were able to agree that the bonus in their case should be the same so they resolved the problem by providing for

a 1 3/4 month bonus and a contingent provision providing that if the Court in the Chartered Bank case awarded a 2 month bonus then the remaining 1/4 month payment would be paid to the employees but as a "special payment" not to be referred to as a bonus. In the other case, negotiations were being conducted under the guidance of the Chief Conciliator at the Ministry of Labour. The final stages had been reached and the issue boiled down to quantum of bonus. At about this time the Chartered Bank case came out with the two month bonus provision. However, in the Chartered Bank case the wage scales had been left as they were, whereas in the ongoing negotiations the Company had agreed to some upward revision in wage scales and it had offered a one and three-quarter month bonus.

In the next meeting the company makes fresh proposals of \$105,000 on salary scales and adjustments, and \$110,000 on bonus. The \$5,000 increase on salary scales is to be spread out among the various categories. It will also cost the company a further \$130,000 over the same period, in respect of Malayan employees as it has been agreed that the company's payment in Malayan branches will correspond directly to Singapore bonus payments.

...In the reconvened session, the Company put it straight to the Union negotiator that if he could get the \$215,000 package including the 1 and 3/4 month bonus accepted by the membership, a one week's ex gratia payment costing \$40,000 will be made withal. T2/

Thus, in the later stages, Court awards and other recent agreements often are called into action to provide a convergence mechanism for final agreement.

There is one further feature of collective bargaining negotiations requiring amplification. This is the use of the referral to arbitration as a technique for imposing a deadline and bringing about more pressure for agreement. Deadlines in bargaining are important; if they are not available

negotiations tend to become prolonged and they can bog down especially as a contract range becomes more apparent. The strike deadline in North American negotiations performs this function of providing an eleventh hour. In one set of negotiations in which an hourly wage rate was at issue one company negotiator deliberately dragged through negotiation and conciliation and finally had the case set down for arbitration. He deliberately withheld his final position until the day before the case was to be heard by the Arbitration Court. His explanation for this conduct was that he knew that concessions prior to some final point would only lead to further union demands. He said that he needed to come to an eleventh hour before he could be confident that a concession would lead to a firm agreement.

Unilateral submissions to arbitration have developed from a device that was not originally intended for such use and they have become increasingly popular, not so much as devices for getting before the court but as techniques for establishing a deadline. Under a recent amendment, Section 37 (5b) allows either party to unilaterally apply to the Court for an extension of the existing agreement with amendments. Once such an application has been made and more than 2 months of negotiations have been undertaken then the Court automatically has cognizance of the dispute and it will hear it in the same way as if it had been a joint submission. By this device the Singapore system has in effect been turned into a system where either party can compel the other to submit to arbitration on its own motion. As well, the unilateral application for an extension has the other effect of giving the Court cognizance over the dispute thus rendering any industrial action illegal. Union people believe that this can be

readily circumvented but there is little evidence to support them and the strike statistics would appear to indicate the opposite. D/

Furthermore, the available statistics would indicate that the arbitral device does operate effectively in providing a deadline. Often final settlements are not reached until a day or so before the hearing is slated to begin. From the available statistics, of sixty cases the court has had withdrawn without a hearing fifty-two originated as Section 37 (5b) applications for extensions. T/ This would seem to corroborate the judgment that the date for a court hearing does operate as a deadline and that it does fulfill the function of a strike deadline insofar as a final point in time is necessary.

In the time period of the negotiations upon which this analysis is based, although theoretically a strike remained an alternative to agreement and arbitration it rarely played a significant role as a "cost of disagreement". Lesser forms of industrial action such as bans on overtime and go-slows were more significant but they too did not play a substantial role as a coercive force. The "cost of disagreement" was largely made up of the cost and trouble of arbitration and the uncertainty of the possible result. This cost of disagreement was not measured against the cost of a concession. For the large part it was measured against the difference that might be gained by not granting a demand and going to arbitration.

There were several elements that made up the cost of arbitration. One was the fact that arbitration cases invariably caused a rupture in the morale of the employees on the job. Employees were constantly aware of the dispute with their employer. As well, the adversary nature of the arbitration process was harmful to the relationship. An employee acting as a union

advocate would be faced with cross-examination of his superiors and this invariably harmed the relationship as it was embarrassing for the employer-managers to be put under the scrutiny of the employee advocate and Court in public. Furthermore, employers generally did not like to allow either conciliation officers of the Court personnel to pry into their internal affairs, particularly their financial affairs. And finally, most employers realized that their future relations with the union would be better if the union officials could be seen by the members of the union as being responsible for the agreement, at least if there were some increase involved. Arbitration did not do this effectively and therefore when an employer intended to grant something he generally regarded it more desirable if it was by agreement.

There were comparable costs of arbitration from the union negotiator's point of view. As mentioned, he looked better if an agreement was reached where some benefits were gained. But to the union negotiators the arbitration process itself was strongly disliked. The time and trouble involved in the preparation and presentation of a case was oppressive. Unlike management they did not have ready access to an adequate supply of qualified personnel to handle arbitration cases. And furthermore, most union personnel felt that they were at a disadvantage in presenting cases in the court. Delay was a direct cost to the union. The Court's practice is not to make awards fully retroactive and with delays of over a year often the employees can suffer substantial losses. Thus, the union negotiators and officials, like their management counterparts, find considerable costs in proceeding to arbitration and it appears that these costs do function to create a sufficient conflict-choice situation to support meaningful negotiation.

3. Some Statistics

What statistics there are corroborate two general judgments regarding the arbitration system and the processes established by the Industrial Relations Ordinance of 1960. Work stoppages have been substantially reduced and an arbitration system has been in operation without seriously undermining collective bargaining negotiations as the basic vehicle for regulating the management-worker relationship. Table I indicates a substantial lessening of strike activity over the last five years. And of the strikes over the past three years fifty per cent were not connected with disputes over the terms and conditions of employment to make up agreements.

TABLE I

*TABLE: INDUSTRIAL STOPPAGES BY PRINCIPAL CAUSES

	<u>Total</u>	<u>Wages</u>	<u>Dismissals</u>	<u>Fringes</u>	<u>Other</u>	<u>Man Days Lost</u>
1961	116	32	25	12	47	411,891
1962	88	33	21	5	29	164,936
1963	47	16	16	1	14	388,219
1964	39	6	16	-	17	35,908
1965	31	8	10	1	12	49,388
1966**	11	1	4	4	2	43,454

* Source - Monthly Digest of Statistics - Vol. VI - No. 1 - Jan. 1957

** Does not include December 1966.

There were over a thousand collective agreements certified by the Industrial Arbitration Court between 1961 and 1965 as compared with twenty-nine Awards disposing of disputes over the terms and conditions of employ-

ment (Table III). Over 97% of all interest disputes were settled by agreement. Only 29 had to be referred to arbitration.

Table II

COLLECTIVE BARGAINING AGREEMENTS

	(a) Certified	Ministry of Labour Conciliation	Conciliation by (c) R/ar-Ct.	% Unasst.	% Asst.
1961	121	N/A	5	-	-
1962	264	85	13	64%	36%
1963	268	60	12	74%	26%
1964	165	45	15 est.	63%	37%
1965	196	47	17	68%	32%
	1014	237	62		

Sources:

- (a) - President of Arbitration Court Annual Reports.
- (b) - Reports of the Ministry of Labour.
- (c) - Records of the Registrar of the Industrial Arbitration Court Annual Reports.

As Table III indicates only a third of the negotiated agreements involved third party intervention either by the conciliation department of the Ministry of Labour or by the Registrar of the Industrial Arbitration Court.

Table III, below indicates the actual interest disputes which resulted in an award of the Industrial Arbitration Court and it classifies them according to the number of issues involved and as between the public and private sectors.

Table III

* TABLE: INTEREST ARBITRATION AWARDS

	<u>Total</u>	<u>2 issues or less</u>	<u>2 or more</u>	<u>Public</u>	<u>Private</u>
1961	4		4	1	3
1962	3	1 (bonus only)	2		3
1963	4	2 (bonus only)	2	1	3
1964	9	5-3 (bonus only) 2 (other)	4	3	6
1965	9	4-1 (bonus) 3 (other)	5	2	7
	29	12	17	7	22

*Source - Reports of President of I.A.C. and Gazetted Reports of Decisions.

Of these awards of the Court 40 per cent involved only one or two issues but of these the bonus was an issue in more than half. Thus it would be fair to say that the Industrial Arbitration Court has succeeded in not usurping interest disputes from settlement by negotiation. It has been busy, but the bulk of its cases have dealt with disputes arising out of the operation of agreements and awards. It is interesting to note, as Table IV indicates, that a high proportion of disputes which required arbitration did not involve governmental intervention in compelling submission, which would tend to support the judgment that the Court has acquired a high degree of acceptability as well. In actual interest dispute arbitrations only about 30% have been by way of Ministerial direction or by Presidential proclamation.

Table IV

*TABLE: VOLUNTARY AND COMPULSORY REFERENCES TO THE COURT

	<u>Total</u>	<u>Voluntary</u>	<u>Compulsory</u>
1960-61	25	16 (64%)	9 (36%)
-62	45	37 (82.2%)	8 (18%)
-63	132	121 (91.6%)	11 (8%)
-64	210	197 (93.7%)	13 (6%)
-65	88	77 (87.5%)	11 (12.5%)

*Source - Reports of President of I.A.C. and Gazetted Reports of Decisions.

Note: All references termed "voluntary" include all forms of unilateral references, Section. 40, 37(4), 41 and 52. There are no separate figures for 30(a) submissions by the parties jointly. Furthermore, not all 30(a) or 30(b) and (c) submissions deal with "interest arbitrations". Many derive from "dismissal and discipline" disputes arising while an agreement or award is in operation. Finally, the figures do not take into consideration "withdrawals" which further distort the implications, i.e., in 1965-60 cases were withdrawn of which 6 were Sec. 30(b) or (c), cases 15 Sec. 28(a) and 31 Sec. 37(4) application for extensions.

4. Summary and Conclusions

In 1960 the Peoples Action Party government passed the Industrial Relations Ordinance, a piece of legislation designed to establish a framework for collective bargaining and as well to provide machinery for the arbitration of interest disputes in situations in which agreement could

not be reached. It was intended, however, that the Court was not to supplant bargaining and it was hoped that this institutional structure would lessen industrial strife and be conducive to a stable, peaceful, industrial relations milieu. It has been remarkably successful. The Court processes have only been invoked in the occasional case, collective bargaining negotiation has been the basic form of dispute settlement and adjustment and where the Court has had to operate, it has enjoyed considerable acceptability with the parties concerned with the exception of trade unionists in the public sector.

(a) The Arbitration Process

The participation afforded the parties at the actual hearing tends to be insignificant. The hearing itself to the sophisticated advocate is not regarded as a meaningful or substantial manner of participation in the decision process. Apart from being a platform for speechmaking, the hearings are used in large part to arm the bargaining representatives on the Court panel with material and argument for the post-hearing conferences. In addition, it is often used to signify acceptable compromise results which can be of significant influence and importance.

The process of decision is not adjudicative although the combination of interest arbitration and agreement dispute settlement in the one body has tended to confuse the development and use of criteria of decision. The Court has emphasized that precedent has no function in arbitration yet relatively clear criteria or guidelines have developed. The most predictable ones, however, are norms contained in Ordinances and precise norms in agreements and awards. It would be impossible to spell out generalized criteria of decision such as "comparability" or "needs of the workers".

And in the area of wages and bonus there is some considerable uncertainty as to what might be awarded although this is decreasing as a result of a recent general policy of restraint.

This uncertainty is to be expected considering the nature of the dispute involved and that the decision process is tripartite. The representative members do function primarily as negotiators and the decision making process is a variation of collective bargaining negotiations. In general, in situations in which the Court has functioned its decisions have been readily accepted and it is well established as an institution in the Singapore industrial relations system. Its cumbersome, time consuming processes and the excessive formality in the hearings and the pages and pages of information that must be presented make it a tribunal that few unionists and management negotiators relish going before especially if the dispute relates to the full range of items. Thus, as has been pointed out, the institutional functioning of the process has created significant "costs of arbitration" which appear to have worked as "costs of disagreement" sufficient to create the conflict-choice equilibriums necessary to substantial collective bargaining negotiations. It would not be unfair to say that the "costs of arbitration" have displaced threats of industrial action as the main coercive or conflicting element underlying negotiations. The availability of a strike has diminished considerably. The government has actively worked against strike action in line with its policy of presenting a stable industrial relations picture to foreign investors. Furthermore the high rate of unemployment and the menacing economic situation have put a premium on jobs and no one is willing to run the risk of losing them.

(b) Arbitration and Collective Bargaining Negotiation

The evidence, both empirical and statistical, supports the conclusion that collective bargaining negotiations have not been fundamentally altered or supplanted by the availability and operation of arbitration. The power relationships have been affected, to the benefit of most unions, and Court awards do influence the outcomes of negotiations but the process of negotiation would appear to be basically unchanged. Conflict-choice equilibrium conditions have been adequately created by the institutional structure and in most cases they were sufficient to induce the negotiatory responses of compromise and concession. In general the character of negotiation resembled Stevens' model with some exceptions. There tended to be greater emphasis and use made of tactics of persuasion and reference to Court awards. But tactics of coercion were interspersed liberally with frequent reference being made to going to arbitration, retrenchment, starting industrial action and calling in the Ministry of Labour. The listing of a case for arbitration operated in much the same way as does the setting of a strike deadline and the availability of applications for extensions made available unilateral access to the Court and made this device operational.

In addition to these institutional features operating to induce and encourage collective bargaining negotiations there were external pressures at work as well. Apart from a general favour for self-determination through collective bargaining the Court itself actively supported negotiation. On many occasions it has commented to that effect and returned disputes for further negotiation. Finally, the unique position of the Ministry of Labour and the subtle power resting with their mediators has tended to promote successful bargaining.

Thus, substantial actual costs in presenting arbitration cases, a real cost to the union in rarely obtaining full retroactivity, long delays with their consequent disruptive effect on the relationship, the ever present uncertainty on money issues and official encouragement for bargaining rather than arbitration have all been effective in maintaining collective bargaining negotiations in Singapore. In these judgments Professor Chalmers would agree:

My second general question about the role of the Court is its contribution to the policy of promoting collective bargaining. Now, on the face of it, a record of 97% agreements without submitting disputes to the Court as compared to 3% in which the Court is called upon to make decisions very clearly suggests that the parties have been making up their own minds most of the time and have not been depending on the Court.

Presumably there would have been a great many collective agreements arrived at even if there had been no Court. The Ordinances had set up a structure for collective bargaining. The unions developed a strength and determination to insist on favorable terms and to get them recorded in formal contracts. The government was prepared to assist these union efforts toward the development of a stable collective bargaining structure. Some employers welcomed such a development while others were unhappy but, generally, employers were prepared to participate in the agreement-making process.

However the establishment of the Court could have resulted in the substitution of arbitration rather than two-party bargaining, despite the apparent general consensus and the formal phrases of the Ordinance. That the arbitration process developed only as a supplement rather than as a replacement of bargaining is partly accounted for by the policies followed by the Court. I find some clue to the impact of the Court out of my earlier analysis of the trends in the Court decisions and opinions. From this, I identified a substantial degree of predictability but still some area of uncertainty as to what the Court might do with a particular issue in a specific set of circumstances.

The capacity of both sides to predict the probable Court response usually leads the parties to agreement rather than to deadlock on such issues. Under such circumstances the submission of an issue to the Court will impose on each side a

delay which is predictably long but uncertain as to just how long. In addition, it will impose on both sides a burden of developing a position so that it may appear in the most favorable light within the patterns of the Court procedures and considerations.

On the other hand there are uncertainties, particularly about wages and bonus, which may well lead each side to prefer the terms which can be negotiated to the risk of other terms that might come from the Court.

(As I edit the lectures for publication I am inclined to add an additional emphasis in my speculation on the relation between the Court and the collective bargaining process. It may be that the parties settle, rather than go to the Court, not so much because of uncertainty about the terms of a possible award as because they wish to avoid the very extensive delay which would follow from a Court referral or because they wish to avoid the extensive burden of the development of elaborate material for presentation in a Court hearing.)

These certainties and uncertainties can be mixed together, in a particular situation, as the parties work on a "package" of issues. Some of the issues may fall into one category and some another. Some may be tentatively settled across the bargaining table, but the tentative settlement endangered if the dispute be referred to the Court (where the Court starts afresh on all of the issues in the original dispute).

It should be added, of course, that this particular discussion has been limited to the considerations of the parties as each decides whether to settle on the best terms available or to submit the issues to the Court. It thus is an analysis that assumes that it is within the discretion of each party as to whether or not to go to Court. There is such a route, of course, provided both sides wish the Court route. But if only one side estimates that the Court decision would be preferable, it has to find some way to persuade the Ministry of Labour as well. The record of bargaining rather than arbitrating is explained in part, then, by the forebearance of the Government.

Adding these considerations together, one can credit the extensive use of collective bargaining to a system within which the Court has played a constructive role. 75

(c) Some Concluding Qualifications

It is reasonable to say that Singapore's experience with arbitration and collective bargaining indicates that the two systems are not wholly incompatible. Indeed, in the Singapore context they exhibit a considerable degree of compatibility. If the institutional structure had been in operation and had enjoyed a similar history for a much more extended period of time it would be a valuable model. But it has only been functioning under the present President for four or five years and not all of its success can be attributed to the personnel or to its intrinsic characteristics.

It has only been for the past year or two that the strike has diminished as an important and real source of creating the conflict-choice situation for collective bargaining. In addition, the trade union movement in particular is under strong direct influence of the People's Action Party, an influence that extends to encouraging acceptability of the system and the Court to not making unreasonable demands on employers, to declining from using strike action, and generally to making the system work and having it appear to the outside world as a stable peaceful place in which to invest capital. All of this plus the fact that Singapore is facing difficult economic problems including a rate of unemployment in excess of 15% tends to take away from the success of the system intrinsically. It is quite possible that the Court could substantially replace the negotiation process and become more and more an instrument for implementing a general incomes policy. The recent Court decisions seem to have been more influential and rumours abound that an incomes policy will be instituted. And, in its present situation, for Singapore the priority of maintaining meaningful collective bargaining is clearly much lower than survival as a nation.

There collective bargaining could be much more readily lessened or even supplanted. It has no lengthy traditional history as the main vehicle for determining the terms and conditions of employment and a precarious economic situation prevails.

REFERENCES

- (1) See generally, Singapore Year Book 1964, Singapore: 1966, pp. 13-55.
- (2) Brackman, Southeast Asia's Second Front, Singapore, Donald Moore: 1966 at p. 4. The Singapore Year Book 1964, however, states the rate of growth to be 2.5%; see page 56, supra, n.1.
- (3) See Brackman, supra, n. 2 at pp. 10-11.
- (4) Supra, n. 1, pp. 25-26.
- (5) For this detail see the Singapore Year Book 1964, supra, n. 1, pp. 27-31.
- (6) Prime Minister Lee Kuan Yew's booklet entitled The Battle For Merger, Vol. V of the Ministry of Culture's Series "Toward Socialism" is a frank and revealing account of the struggles of the 50's an account corroborated by observers and participants alike.
- (7) Bellows, "The Singapore Party System", 8 Jour. of S.E. Asian History, 122 at 128-9 (1967).
- (8) Ibid. at p. 131.
- (9) Supra, n. 2, p.5.
- (10) Brackman, supra, n. 2 on page 5 remarks that "In terms of external trade, about 80% of its external commerce was entrepot in character, half with the peninsula and the remainder with neighbouring countries, principally Indonesia; 20% has been generated by internal needs." Robert E. Gamer, in "Urgent Singapore, Patient Malaysia", XXI International Journal, p. 42 at p. 43 (1966) comments: "There are no published figures on Singapore's national output classified by sectors. However, the following estimates of the contributions of various sectors to Singapore's Gross Domestic Product in 1965 are believed to give reasonable orders of magnitude:

Commerce and Trade	50-55%
Industry and Construction	15-16%
Agriculture and Mining	8%
Armed Forces	13-14%
Tourism	3-4%

- (11) See, Gamer, supra, n. 10, and Brackman, supra, n. 2 at p. 5 where he states that the British military establishments in Singapore provide 25% of the G.N.P.
- (12) See Ronald Ma and You Poh Seng, The Economy of Malaysia and Singapore, Singapore: Malaysia Publications 1966. pp. 10-13.
- (13) Camer, supra, n. 10 at p. 46, n. 13 where he states, "There are no published figures on unemployment in Singapore. Some business sources

talk about current unemployment ranging from 70,000 to 100,000. Some government circles say that 8 per cent of the labour force is currently unemployed. Informed academics feel that the island contains 500,000 to 600,000 economically active individuals, of which 10 per cent to 15 per cent are unemployed."

- (14) Supra, n. 12, p. 16.
- (15) Economic Development Board Annual Report 1965, p.2.
- (16) Supra, n. 12, pp. 42-44.
- (17) See, Chalmers, Crucial Issues on Industrial Relations In Singapore, Singapore, Donald Moore: 1967, Appendix F, "Industrial Relations and Economic Development, The Public Relations of Government and Labour", pp. 257-270.
- (18) For a history of Trade Unionism in Malaysia see Josey, Trade Unionism in Malaysia, Singapore: Donald Moore: 1958.
- (19) Singapore Year Book, 1965 at p. 179.
- (20) For an excellent discussion of trade union organization see Chalmers, supra, n. 17, pp. 54-65.
- (21) See Labor Law and Practice in Malaysia and Singapore, The United States Department of Labor: 1965, p. 31.
- (22) Brown, "Initiation of Collective Bargaining Under The Singapore Industrial Relations Ordinance", 8 Malaya L.R. 292 (1966).
- (23) Supra, n. 21, p. 43.
- (24) Ibid.
- (25) Industrial Relations Ordinance, 1960, ss. 16-19.
- (26) Ibid. ss. 20-22.
- (27) Ibid. ss. 23, 24.
- (28) Ibid. ss. 3-15 and s. 29.
- (29) Ibid. ss. 23(3), 39(1)
- (30) Ibid. ss. 40-42.
- (31) Ibid. ss. 74-78.
- (32) Paul L. Kleinsorge, "Singapore's Industrial Arbitration Court: Collective Bargaining with Compulsory Arbitration", 17 Ind. and Lab. Rel. Rev. 551 at p. 552 (1964); Charles Gamba, "Industrial Arbitration in the State of Singapore" (1963) 5 Journ. of Ind. Rel. 83, at p. 84.

- (33) Supra, n. 28.
- (34) 49 Stat. 449 as amended 61 Stat. 519, 29U.S.C.A.S. 141 et seq. And see Cox, "Some Aspects of the Labor Management Relations Act, 1947", 61 Harv. L. Rev. 1 (1947).
- (35) Legislative Assembly Debates, State of Singapore, 1960 Vol. 2, pp. 149-156 per Minister for Labour and Law, Mr. K.M. Byrne.
- (36) Ibid. See also pp. 176-179 per Mr. G. Kandasamy; Kleinsorge, supra, n. 13, p. 553.
- (37) Supra, n. 36.
- (38) See generally, Brown, "Regulation and Administration of Industrial Relationships in Singapore" in Chalmers, Crucial Issues in Industrial Relations in Singapore, supra, n. 17 at pp. 101-123.
- (39) The Industrial Relations Ordinance, 1960, s. 24.
- (40) Ibid.
- (41) As yet unpublished.
- (42) Supra, n. 39, s. 30.
- (43) Ibid. s. 58 (c).
- (44) Ibid. s. 33.
- (45) See infra, Table I, p. 110.
- (46) For a brief summary of this legislation see Labor Law and Practice in Malaysia and Singapore, supra, n. 21 at p. 31-32.
- (47) The following is based on research into court files and extensive tape recorded interviews with the officials of the Court, the President, the Deputy President and most of the participants in the process.
- (48) Supra, no. 39, s. 60.
- (49) Obtained from a personal reading of the Court records and with extensive interviews with the participants.
- (50) See e.g., Appendix B, I.A.C. Case No. 89 of 1963 Adult Education Board v. The Amalgamated Union of Public Employees.
- (51) Supra, n. 39, s. 11.
- (52) Ibid. s. 66.
- (53) As yet unreported.
- (54) See, Chalmers, supra, n. 17 at p. 87.

- 55/ Ibid. where Chalmers comments on his research, "It is, it seems to me accurate to say that the Court has not defined any one of these five criteria with any degree of precision, and it certainly has not indicated any formula by which these five are put together."
- 56/ Ibid. p. 89.
- 57/ See Table III, infra, p. 112.
- 58/ The following analysis is based upon studies done by Professor Chalmers and summarized in Crucial Issues In Industrial Relations in Singapore, supra, n. 17 at pp. 85-90, upon personal research and upon a graduation exercise by Ooi Kheh Kheong, "Guidelines Used in Singapore's Industrial Arbitration Court September 1960 To December 1965", Department of Economics, University of Singapore 1966-67.
- 59/ These studies were in part carried out by Professor Chalmers and a final year student in economics, Mr. Lim Poh Chaun.
- 60/ See Chalmers, supra n. 17, Appendix I, "The ABC-XYZ Negotiations", 278 at p. 281.
- 61/ A case study prepared by Professor Chalmers but not published because the participants would not give the requisite clearance.
- 62/ Ibid.
- 63/ Lim Poh Chuan, "Labour Negotiations In Singapore, Some Case Studies" Department of Economics, University of Singapore, 1967-68, "The Orion-W.W. Negotiations", pp. 20-21.
- 64/ Supra, n. 17, p. 284.
- 65/ Supra, n. 63.
- 66/ Ibid. p. 26.
- 67/ Another unpublished case history, unpublished because the requisite consent was not available.
- 68/ Ibid.
- 69/ Supra, n. 63, "The Onkyo-W.W. Union Negotiations", p. 36.
- 70/ Industrial Relations Ordinance, 1960, 37 (4).
- 71/ This so-called "application for an extension" is of increasing importance. Originally, the legislation provided only 2 routes for submitting a dispute to arbitration: (1) by joint agreement and (2) reference by the Minister of Labour or the President of Singapore. No avenue was available for a unilateral submission. 37 (4) originally was intended to allow for applications in contingencies. On renewals, however, companies found that the "right to strike" could be limited by this sort

of application. Now, it is frequently resorted to to counter a union strike threat and provide a deadline for negotiations. See further, infra, p. 107.

(72) Unpublished case study.

(73) See, Table I, infra, p. 110.

(74) Infra, p. 113.

(75) Chalmers, supra, n. 17, pp. 91-93.

CHAPTER III

INTEREST ARBITRATION IN AUSTRALIA

In Australia, the arbitration of wages and terms of employment is as much an institution as is collective bargaining in North America. There, employer-employee relationships have been regulated by several systems of arbitration since the turn of the century. Indeed, the mere mention of arbitration of terms and conditions of employment invariably brings the Australian experience to mind and for this reason alone it merits consideration and analysis.

Every industrial relations system is, however, the product of its cultural, economic and political development, and Australia's, of which interest arbitration is an integral part, is no exception. To assess the feasibility and utility of establishing a similar arbitral system in any other industrial relations system, the working of the Australian system must be seen in its larger industrial relations context.

AUSTRALIA'S INDUSTRIAL RELATIONS SYSTEM

1. Historical Development

...The outcome of Australian social history cannot be explained without reference to the natural features of the Australian sub-

continent climate, soil, resources, and above all water. The founders had to contend with an intractable land mass, and much of what they did was largely determined by it. Tropical horticulture was ruled out for the bulk of Australian settlements, whatever their cultural background. But geographic determinism is not a sufficient explanation of Australian history, and the striking feature of that history is its British character. More than this, Australia's uniqueness is a result of settlement by a particular fraction of British society. For Australia was never a microcosm of Britain. The British aristocracy did not touch Australia, and even the substantial middle class did not find an important place in Australian development. At one extreme Australia was bourgeois; at the other it was unrelievedly proletarian. Labouring classes have had a prominent role in Australian history, and the divisions in Australian society, important as they have been, have taken place within an overarching working context. Australia was and is a land of toilers, and even the graziers have not been notable exceptions to this rule. 1/

This central thread can be traced through the various periods of the nineteenth century which gave birth to the Australian society and its industrial relations system. From penal colony through wool, gold, the boom of the seventies and eighties to the bust of the nineties, Horatio Alger is turned upside down. 2/

Although Australia began as a penal colony in 1788 its future was not assured until McArthur returned from his court martial in England in 1805 with 30 convicts as pressed labour and the first merino sheep. Wool determined the economic destiny of Australia. The ideal conditions, climatic and geographical, no need for skilled labour, and its ready transportability to a ready market put the Australian economy on the sheep's back: 345 pounds were exported in 1806, by 1821 this had increased to 175,000 and by 1840 to over 12 million pounds. 3/

Soon the need for labour outstripped the supply of convicts and immigration began. In 1820 a program of assisted immigration was initiated and by 1840 the preponderance of convicts and emancipists was numerically

overcome. The immigrants, however, were of a certain character. Generally they were poor, too poor to pay their passage to America. They were paupers and workers, the products of the enclosure movement, the developing industrial system in England, and the Poor Laws, liberally sprinkled with Chartists, trade unionists and other working class radicals, people with grievances against the British social system and the unregulated Industrial Revolution. 4/

By 1850, wool exports reached 60 million pounds but the wealth this generated was confined to the few with sufficient capital to establish a sheep run -- the squattocracy. As a result, the immigrants were required to seek employment in the cities which by then had spawned a number of secondary industries. By 1850 there were 480 small factories in Australia including 14 iron and brass foundries in Sydney. These conditions and a general shortage of labour provided suitable conditions for the organization of labour. By 1850 there were several unions and strikes began to occur.

Gold, found in the early fifties, triggered off the third wave of immigrants and it added new impetus to Australia's economic development. The immigrants of the fifties and sixties changed the mix. Although they too included Chartists and others from the Owenite movements in England and some refugees from the 1848 revolutions in Europe who brought with them ideas of equality and democratic rights, the gold diggers added a new strain to Australian blood. They were motivated by a desire to improve their economic condition and status. They were self reliant and energetic and were readily disposed to an assault on privilege. "In political terms Australia was the 'radical' fragment of British society. A certain admixture of 'philosophical radicalism' mitigated the working class ethos of convicts, gold diggers, Chartists, and trade-unionists." 5/

For a decade or so gold provided an alternative to the cities and the sheep station in much the same way as did the frontier in the United States and Canada. It also led to expansion in manufacturing and financial centres. Although some attempt was made to open the land for settlement by small farmers, it failed, leaving the great majority of Australians with no alternative but to work for wages once the gold rush had subsided. Politically, however, the squattocracy was overwhelmed and its vast economic resources were ineffective to remedy its political obsolescence. *6/* The industrial boom of the seventies and eighties stimulated both immigration and trade unionism. By 1890 secondary industry had expanded to the stage where it employed about the same number of workers as did primary industry (123,000) and to where it contributed about the same proportion to the national income (30%). Concentration in the cities continued to increase and the growth of the city population and the long period of boom fostered the growth of trade unions to the point that by 1890 they numbered 124 with 55,000 members. Indeed, although the pastoral industry was the beginning of capitalism, Australia had a highly organized labour movement before it had organized capital. Instead of allowing capitalism to capture the liberal myth, as happened in America until 1929, in Australia the radical myth captured capitalism and it has not yet let go. It was this weakness of capitalism that led to the alliance between the industrialists and labour to foster protection against the great agriculturists. The tariff was viewed as a device to maintain high wages and high profits. Paradoxically, it was labour's alliance with industry that gave birth to capitalism in the Australian context. And this period of alliance from 1850 to 1890 had an impact on Australian politics which has continued to the present. Just as

in America where the labour movement has never been of fundamental political significance, in Australia it is business which has "been the gadfly of Australian politics". 7/

In 1890 the bubble burst and Australia entered a severe depression which resulted in a round of fundamental, bitter, industrial struggles. There were four major strikes in four years: the Maritime Strike of 1890, the Shearers Strike of 1891 in Queensland, the Miners Strike of 1892 at Broken Hill, and the Shearers Strike of 1894. 8/ Each lasted a few months but they were part of a general struggle over who was to absorb the brunt of the economic downturn. The strikes were bitterly fought with violence, intimidation and bloodshed. They were classed as insurrections and they met with the full force of the police, troops and government administration. The employers by this time had organized to deal with labour and it was not surprising that the strikes failed. The easy successes enjoyed by the labour movement in the eighties had given it an inflated impression of its strength. Despite a nearly 90% membership among the shearers and miners, in 1890 the trade unions covered only 20% of the total labour force which left a more than adequate pool of non-union labour for the employer's needs.

In any event, the strikes had two basic results which forged the present industrial relations system in Australia. It re-emphasized to the labour movement the power of political organization and direct participation. Labour saw a direct method of reform through gaining a majority of the State Legislatures. In 1891 a Labour Electoral League was established in New South Wales and a Progressive Political League in Victoria in 1892 and these working class parties were the beginning of the Australian Labour Party. 9/

The second direct consequence of the massive strikes of the nineties was a profound disillusionment as to the utility of direct economic action and a correlative belief that arbitration would have been a more satisfactory means of obtaining justice for the workers in industry. The leaders of the Miners and Shearers began to advocate that state appointed impartial courts be established to settle quarrels in industrial relations as had been done for other quarrels in civil life. Employers had not forgotten the latent strength of the labour movement and they realized that if Australia was to develop industrially some means was required to control labour disputes. "Whether the strikes marked a significant departure from the past or whether they simply accelerated tendencies which were already operating is an interesting point which has been debated by historians. It is generally agreed, however, that the strikes emphasized to the unions a number of things - the need for closer coordination of their activities; a greater cleavage between labour and capital than had generally been supposed; the importance of direct political representation and the protection to be secured from compulsory arbitration. It could even be argued that these strikes played a crucial part in shaping the subsequent character of Australian industrial relations." 10/

The twenty years following the strikes saw the trade unions develop both numerically and organizationally and the Labour Party become firmly established politically. And, the various Legislatures and the Commonwealth of Australia during this time did establish systems of arbitration which formed the basic principles and structures of industrial arbitration in Australia.

2. Employee Organization

The great strikes of the nineties were turning points in the development of the labour movement in Australia both politically and industrially. They directly caused the formation of the Australian Labour Party and the institution of arbitration both of which rapidly stimulated union growth to the point that today Australia is one of the most highly unionized countries of the world, with almost 60% of the wage and salary earners belonging to trade unions. 11/

The size of the unions range from five members to two hundred thousand and almost all are affiliated to the Australian Labour Party. Although there are many small unions, 5% have memberships of over 40,000 each and these make up over 50% of Australian trade union membership. 12/ This structure is in large part the result of the arbitration system which has regarded the existence of unions as necessary to its operation. With no central control in the early years of the century the formation of unions in a piecemeal fashion was encouraged and once they became registered under the Arbitration Acts, their continued survival was assured. And as the arbitration decisions accrued to all union members regardless of the size of the unions, smallness of size was not really detrimental. Insofar as bargaining strength improved the general level of working conditions for members of larger unions these improvements were soon passed on to all unions through arbitration.

There are four basic forms of union organization in Australia: craft, occupational, industrial and general. 13/ Early unions were organized predominately along craft lines. Subsequently, workers in the semi-skilled categories were brought together on occupational lines as for example in

the Federated Engine Drivers. The industrial form embraces all workers in a particular industry excluding the craft organized tradesmen and the general form of union organization enrolls all workers regardless of occupational or industrial differences. There are only a few such general unions, the most notable being the 200,000 strong Australian Workers' Union which is largely made up of shearers, other rural workers, miners and construction workers.

The various administrative units in the union structure are full of tensions and varying degrees of power. Schematically, unions consist of various branches headed by either full or part time secretary-treasurers. Depending upon the union, these branches are usually the state organization of the union. The formal upper tier is the Federated Conference, the supreme policy making body of the union with over-riding authority over the branches (an authority required for registration under the Commonwealth Arbitration Act). 14/ Inter-union organization is highly developed, a consequence of the arbitral system, although its effectiveness varies from one state to another. At the shop level, the shop stewards of various unions in many cases have organized themselves into shop committees and because of their militancy in recent years have frequently embarrassed the official union leaderships. As one commentator has stated:

...The strength and militancy of shop committees in which Communist leadership is often prominent, is the result of inadequate union organization and control at the plant level arising partly from neglect of this level of organization, partly from extended lines of communication and partly from inadequate staff at the branch to attend to grievances at the plant level. 15/

Officially, inter-union organization is made up of Trade Hall Councils (T.H.C.) in each state and the federal Australian Council of Trade Unions

(A.C.T.U.). The Trade Hall Councils in effect are the State Branches of the A.C.T.U. This strong tendency to centralization stems from the arbitral system and from the craft and occupational character of most union organization.

The task of the Trades Hall Councils and the Australian Council of Trade Unions is to co-ordinate union activities and assist in intrastate and interstate bargaining and arbitration. One of the important functions of the Trades Hall Council is to control intrastate strike activity. The Disputes Committee of the T.H.C. must be informed of any action involving two or more unions and theoretically it makes the final decisions. The main task of the A.C.T.U. is to formulate and co-ordinate union policy and practice in industrial and political matters at the national level. It also undertakes the preparation and presentation of the national wage cases, hours of work and leave matters before the Commonwealth tribunals. Its Disputes Committee is supposed to regulate bargaining and strike activity where more than one union is involved in a dispute extending beyond one State. 16/

In addition to the A.C.T.U. and the T.H.C., white collar unions have developed similar national inter-union organizations. White collar unionism in Australia 17/ is highly developed with a membership of over half a million in 192 unions. The main inter-union bodies are the Australian Council of Salaried and Professional Associations (ACSPA), the High Council of Public Service Associations (HCPSA), and the Council of Professional Associations (CPA). These organizations have worked closely with the A.C.T.U. in the past few years especially in the presentation of the national wage cases before the Commonwealth Arbitration Commission.

Politics and trade unionism go hand in hand in Australia. The Australian Labour Party (A.L.P.) has been the political arm of the trade union movement ever since it was formed by the unions in 1891. The strength of the union delegates at the A.L.P. conferences is predominant and it has generally assured that those controlling the unions also control the Labour Party. But the influence does not flow the other way. The unions have traditionally opposed any interference in their internal affairs by the A.L.P. and in recent years this has seriously weakened the A.L.P. The post war years have seen a number of divisions along Communist and Catholic lines which in 1955 led to a split and the formation of the strongly anti - Communist, Catholic supported Democratic Labour Party (D.L.P.). Although this division has seriously hampered the trade unions political efforts of late, legislative control has been one of their most potent weapons for reform and improvement of working conditions. 18/

The apparent strength of trade unionism in Australia, however, should not be misleading. Financially the unions are poor and this, among other factors, has contributed to poor leadership, inadequate staffs and severe restraints on their ability to bargain effectively and to implement strike action. The recommended annual dues for many unions is \$12 a year. There is only one paid official for every two thousand members in the Victorian trade unions, and organizers and officials are paid only slightly more than their working members. 19/ Furthermore, the political affiliation with the A.L.P. has been a constant drain on the union officials' time and industrial leadership. On the surface, then, the Australian trade union movement would appear to be overwhelmingly powerful but by North American standards it is not. Inadequate financing has hampered organization and communication rendering any sustained direct action almost impossible. It has kept the

quality of its leaders substandard and often more involved in politics than in union affairs. These internal weaknesses are regarded as the most serious problems in Australian trade unionism today and nothing as yet appears to be being done about it; the Federal Unions and the inter-union associations of the Trade Hall Councils and the A.C.T.U. appear to operate almost in a vacuum of their own creation.

3. Employer Organization 20/

Just as arbitration has had a profound effect on the form and organization of the trade union movement in Australia, so it has had a corresponding influence on the character of employer organizations. Although employers had begun to band together in the eighties and nineties to counter growing union strength, it was not until after the turn of the century and the establishment of the arbitration systems that the employer organizations flourished.

Initially, employers saw arbitration as a fundamental attack on management rights and they delayed registration of their organizations. It was not long, however, before it was realized that arbitration could be a defence against excesses by the unions. With this, a change of attitude came about and various employers' associations registered under the Acts and became strong proponents of the system. Moreover, once established, the employers' associations developed a vested interest in their continued survival and growth and they saw in expanding industrial regulation an assurance of their own security and development. By 1966, there were sixty-six employers' organizations registered under the federal legislation alone. 21/

The associations developed basically along two lines: industrial as-

sociations and general associations. Internal administration generally is three tiered. It consists of a council; an executive committee and a full-time secretariat and staff which carries out the day to day work of the association including — indeed as its primary function — negotiation and arbitration of its members' industrial relations disputes. The main internal problems of these associations are keeping their members from succumbing to union pressure and restraining them from competitive bidding for labour when it is in short supply. All associations attempt to "hold the line" and avoid having a few of their members undermine the position of the majority. The only effective coercive power behind these policies is the moral condemnation of the members' peers and this has enjoyed only varying degrees of success as evidenced by the wide prevalence of over-award payments in recent years.

Each of the major associations has developed its own particular approach to industrial matters. For instance, the Metal Trades Employers Association has traditionally resorted to industrial tribunals in an endeavour to hold the line against the militant metal trade unions. On the other hand, the Chamber of Manufacturers in New South Wales and the Victorian Employers' Federation have shown a greater willingness to deal directly with the unions involved. 22/

Formal machinery for inter-employer association relations developed in direct response to the importance of the national wage cases. 23/ In 1961 the National Employers Policy Committee was formed, basically, to conduct the national wage cases on behalf of employers and to deal with other national matters in which the Australian Council of Trade Unions was involved and, in substance, this work is carried out by a few of the Committee's full-time industrial officers.

The political connection between employers' associations and political parties, in contrast to the trade unions, is virtually non-existent. A few of the agricultural associations are linked with the non-labour parties but, generally speaking, the employer associations concentrate their resources in industrial services rather than in political activity and they do not play an important lobbying or a direct political role.

Again in contrast to the trade unions the employers' associations are well financed and well staffed. Fees are paid either on an annual basis or on the basis of actual services supplied. This financial advantage together with the concomitant ability to have skilled and adequate staffs of industrial officers has proved to be of considerable advantage before the industrial tribunals.

Although employer organizations were in existence prior to the passage of the arbitration legislation, and although their existence is not required for its operation, arbitration has fostered their growth. The associations have grown up to be the source of skilled assistance for dealing with organized labour both directly and before the industrial tribunals. The Legislation has induced centralization and specialization and it has produced a new profession which operates through the device of employers' associations.

4. The Industrial Arbitration Legislative Schema

...Mix together two State arbitration systems which have some similarity, two similar State wages board systems which are different in some respects, two State systems which are cross-bred between arbitration and wages board systems, and a Commonwealth arbitration system which has some similarity to the State systems. Drop in an assortment of associated tribunals both State and Commonwealth, such as Coal Industry Boards, a Stevedoring Industry Authority, Public Service Boards, and various other subsidiary tribunals. Season with Departments

of Labour, both State and Commonwealth, a Tariff Board, State Trade Union Acts, and special State legislation to cover such things as compensation, apprenticeship, equal pay, hours, long service leave and adjustment to the basic wage. Throw in some common law, sprinkle with the legal fraternity, flavour with a suggestion of lunacy, and simmer the mixture well on the hot-plate of employer-employee relationships.

And there it is a dish rich enough to give mental indigestion to even the strongest mind!

Recipe — "legislative goulash" — Penal Powers. 24/

To a considerable degree this "goulash" stems from the Australian Constitution. The Constitution established six state governments and a federal government each sovereign within its sphere with the High Court of Australia as the adjudicator of jurisdictional disputes. 25/ Basically, industrial relations is a matter within the State sphere but paragraph 35 of Section 51 gives the Commonwealth power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state". This provision has resulted in the present elaborate Commonwealth arbitral machinery with the States adopting similar regulatory systems and tribunals for disputes not coming within the Commonwealth tribunal's jurisdiction.

The State systems are beyond the scope of this enquiry. 26/ They are quite diverse in their make-up and would provide the basis for some interesting comparisons but generally in effect they are subservient to the Commonwealth system. 27/ Portus has noted that on the whole state tribunals have tended to follow the lead of Commonwealth tribunals and the State legislatures have passed legislation requiring the State tribunals to incorporate the Commonwealth decisions on such matters as the basic wage, the length of the working week, annual leave, and long service leave. 28/ Direct

legislation by State governments in industrial matters has been by far the most influential State action. For this reason, and for the obvious reason of feasibility this enquiry focuses solely on the Commonwealth arbitral system.

The structure and operation of the Commonwealth arbitral authority has undergone several major structural changes since its inception.^{29/} It began in 1905 with one President, one Industrial Registrar and five Deputies plus a small administrative staff. By 1913 two Deputy-Presidents were added. These functionaries were changed to Chief Judge and Judges and in 1928 they were empowered to appoint Conciliation Committees to settle industrial disputes. In 1947 the powers of the Judges were limited to fixing the basic wage, standard hours, and annual leave and interpreting and enforcing awards. Eighteen lay Conciliation Commissioners were appointed to deal with all other matters. The next major change came in 1956 when the Boilermakers challenged the constitutionality of the body. The Privy Council upheld their argument and declared that the Constitution prohibited the union of arbitral and judicial powers exercised by the Judges.^{30/} A new structure was devised. The Commonwealth Conciliation and Arbitration Commission was created to exercise the functions of conciliation and arbitration. The Commonwealth Industrial Court was constituted to exercise the judicial function, the interpretation and enforcement of awards.

The personnel of the Commonwealth Conciliation and Arbitration Commission in 1966 consisted of the President, five Deputy-Presidents, the Senior Commissioner, twelve Commissioners and three Conciliators, excluding the other special tribunals and the Public Service Arbitrator. In addition the Commission has an Industrial Registrar and eight Deputy Industrial

Registrars. 31/ The Commonwealth Industrial Court is composed of a Chief Judge and four Judges. 32/

The work of the Commonwealth Conciliation and Arbitration Commission stems from the seemingly simple constitutional prescription of "the prevention and settlement of disputes extending beyond the limits of any one state". How this is carried out, however, is somewhat more complex. The "Presidential Bench", that is, a tribunal consisting of at least three Presidential members, has primary jurisdiction for determining the male and female basic wage, standard hours of work, and long service leave. If the President feels that a matter not otherwise in the primary jurisdiction of the Presidential Bench is of such public importance that it should be dealt with by the Commission in its most authoritative form he can direct a reference to a "Full Bench". This is composed of at least three Presidential members and, where practicable, by the Commissioner responsible for the industry in which the matter arose. Such matters as the "general margins cases" are heard by the Full Bench. All other matters are left to the lay Commissioners. 33/

The lay Commissioners are empowered to conciliate and arbitrate industrial disputes. They are so organized that each is given responsibility for a fixed group of industries and any inter-state dispute arising in those industries comes under the jurisdiction of the Commissioner to whom the particular industry is assigned. A salient feature of the system has been the increasing role played by the Lay Commissioners in the operation of the system. Most individual interest arbitrations are made by the Commissioners despite the fact that there is a provision for appeals to be taken from the decisions of the individual Commissioners to a Full Bench. 34/

The three Conciliators have no authority to arbitrate. They rarely act on their own motion, but rather act either on request or on assignment from the members of the Commission. The Industrial Registrar and his Deputies are the main administrative functionaries on the Commission and they are empowered to register organizations covered by the Act, conduct ballots, to register rules of organizations, cancel registrations and carry out other related matters.

One significant feature of the Commission's powers is that it is not restricted to determining disputes submitted to it by the disputants. If it wishes, the Commission can move on its own initiative and indeed some lay Commissioners will frequently do so. It is restricted only in that an "industrial dispute" must exist.

The Commission has the power to deal with industrial matters relating to public servants of the commonwealth and does so both directly and through its control over the Public Service Arbitrator. 35/ Control by the Commission of wages and conditions in the maritime, stevedoring, and coal industries is exercised in each case by a separate tribunal headed by a Deputy President of the Commission. The working conditions of employees of the Snow Mountains Authority now is also under the control of the Commission. 36/

As mentioned earlier, the Industrial Court has jurisdiction over judicial matters. By and large this is restricted to the interpretation and enforcement of awards, matters which are not the concern of "interest" arbitration. The remaining governmental organization, the Department of Labour, plays a routine role in the operation of the system including some supervision and enforcement of awards.

INTEREST ARBITRATION UNDER THE COMMONWEALTH
ARBITRATION AND CONCILIATION ACT

Not only can a distinction be drawn between "rights" arbitrations and "interest" arbitrations but as well, under the Commonwealth scheme in Australia, there are varieties of "interest arbitrations" undertaken in differing circumstances. The two most fundamental forms of "interest arbitration" are the so-called "economic cases" heard by either the Presidential Bench of the Full Bench, and the individual arbitrations made by lay Commissioners. Each will be dealt with in turn.

1. The Economic Cases

The Commission in Presidential Session determining the basic wage for males and females and in a Reference Bench determining the national margins cases has evolved into an economic policy-making undertaking. 37/ Hours and long service leave are not recurring matters. They were dealt with some years ago and to this date have not been re-opened. It is the basic wage and general margins review that make up the so-called "economic cases". At one time these two matters were dealt with separately. However, in recent years the employers have sought to have them heard simultaneously and in 1967 38/ the Commission in its annual determination stated that the basic wage and margins would be dealt with as a "total wage" so that in the future there will only be one economic case dealing with the total wage combining both the basic wage and general margins.

(a) The Participation of the Parties

To comply with the Constitutional requirement of determining an existing dispute, the parties to the national cases, using the Metal Trade Award

as a base, create a paper dispute. Claims are served by the union de facto on the National Employers Policy Committee. These are formally rejected and the dispute is created. To some degree the Commission can control the hearing of these cases, if in no other way than by delaying the hearing.

In fact in the 1967 "Pronouncement by the President" he stated:

This decision gives the third general increase in our award wages in twelve months. We all think it undesirable that in the absence of special circumstances there should be any further economic review before the second half of 1968. The new wage fixation procedures require that an application should be made each year for an economic review of the total wage. The employers have stated that, in the absence of any union application, they will make the appropriate application to the Commission each year. I therefore anticipate applications from one party or the other which will enable me to list the hearing of the next annual economic review for Tuesday 6th August 1968 and subsequent reviews each August. 39/

Thus, in effect, the initiative to institute the Commission's processes in these cases lies with the parties in form only. In substance the Commission itself controls institution of the decision. The A.C.T.U. carries the burden of the union argument and the Council of the Australian National Employers Federation represents employers. The professional and white collar union associations are also present but in practice they leave the burden of the submission to the A.C.T.U. advocate. As well, the Commonwealth Government and the State Governments participate by way of intervener and the Commonwealth submissions include the basic statistics upon which much of the argument at the hearing is based.

The parties' participation in the decision process is formally by way of adducing evidence and making arguments but the character of this is in a state of flux and it has undergone considerable change over the past few years. 40/ In 1961 both the Employers Council and the A.C.T.U. relied to

a considerable extent upon expert testimony of economists but because of the manner of cross-examination most economists have since refused to subject themselves to this treatment. Thus, the evidence adduced before the commission in the past few cases has consisted almost wholly of official statistics, exhibits of the parties "manipulating these statistics", articles from learned journals and oral argument. The statistics provided by the Commonwealth government's submission have come to be accepted as the basis for everyone's argument.

The greatest proportion of time spent at the hearing is in hearing the argument of the two main participants and the Commonwealth advocate. Essentially, the parties in their arguments attempt to draw implications from the economic data which most favourably support their demands and rationalizations. The argument, however, is almost always extremely general and inconclusive. In fact, the advocates see themselves as attempting to persuade the members of the Commission to general points of view and then to arm them with rationalizations to support that point of view in the post-hearing decision process. The employer's overall strategy in the latest case was to drive home the procedural change of the total wage. The union advocates realized that the procedural change would likely come about and that they would lose the opportunity to have two bites of the cherry so they developed an overall strategy of stiff resistance in the hope that they could extract a "quid pro quo" of some increase as the price of the change. Therefore in the 1967 case the union argument was primarily directed to pointing out the evils of a "total wage" and in particular organized labour's displeasure. The argument was also pro forma in directing itself to a wage increase. No serious attempt was made to make an argument for a realistic increase. Rather, the A.C.T.U. asked for a 25% increase in the basic wage and made a

somewhat artificial rationalization for requesting that amount. In turning to the amount of the increase the Union advocate referred the Commission to all that he had to say in the previous cases and continued:

I put to the Commission on this occasion that because those issues of principles have been argued at length so recently, and because those answers have been given, the presentation of the union's case for the increase in the basic wage on this occasion has been greatly facilitated.

I put strongly to members of the Commission at the outset of these submissions that an examination of last year's judgments, when taken in conjunction with previous judgments of the Commission, establish beyond question the justification for the trade union movement in bringing this claim before the Commission, and such an examination that I will undertake will show why the Commission should move to grant this basic wage claim. However, before proceeding with that analysis, it is appropriate that I should explain in some detail the composition of the claim for an increase of \$7.30 in the basic wage.

...

The members of the Commission will see that the Six Capitals basic wage for August 1953 was \$23.60; as a matter of fact of course that remained the Six Capitals' basic wage until the middle of 1956 when there was a 10% increase, but it was the Six Capitals basic wage of course for 1953/54.

The Consumer Price Index average for 1953/54 was 102.0; members of the Commission may wish to note that that is derived from the fact that the figures for the four quarters were 102.1 101.7, 102.1 and 102.1, which gives you the average figure for the year 1953/54 of 102.0.

The Consumer Price Index for the December quarter 1966, the last one available, is 138.4, which gives you an increase in prices as measured by the index over that period of 35.7 per cent, which means that the Six Capital Cities basic wage for 1953/54, adjusted for the increase in prices since that period, would need to be \$32.00, and the calculations are set out there for members of the Commission.

The increase in effective productivity from 1953/54 to 1965/66 is 25.3 per cent. Let me say to members of the Commission that

I will of course be going to the exhibit in due course which sets out how we arrive at that figure. From that we are able to find that the Six Capitals basic wage for 1953/54, adjusted for increase in prices just to have it maintain its same real value, and then being adjusted for the increases in effective productivity that have occurred since that time, would need to be \$40.10. The existing Six Capitals basic wage is in fact \$32.80, so that the claim for an increase in the Six Capitals basic wage is for an increase of \$7.30.

I would make the point that at the outset that the existing basic wage is \$32.80, and that in fact if you just had the same real value of the 1953 basic wage it would be \$32.00, so that we have the situation that the basic wage is now, some twelve years later, only 80c higher in real value than it was at that point in time, or in other words over this period of twelve years which has been marked by increased economic capacity, economic growth, improvement in productivity, describe it how you will, over this period of these increases the basic wage has in fact increased by the magnificent sum of 2.5%. Of course I will be referring to that in more detail later in these submissions. 41/

No one contemplated that this claim would be granted. In fact the argument was somewhat artificial in that margins were not referred to nor was any consideration given the prevalent conditions of "over-award" payments which in many industries and localities exceeded the \$7.30 claimed. The inter-relationships of various aspects of workers earnings were simply ignored. In fact, both advocates worked in the belief that the result would be "total wage" plus an increase of between \$.50 to \$1.50. The final result was "total wage" plus \$1.00.

Thus, although the advocates did not feel that their argument was a real factor in the determination, they both were of the view that the efforts were largely responsible for shaping the general approach of the Commission over the past few years and in making it much more sophisticated and aware of economics. There is a general consensus that the argument of the Commonwealth government's counsel as to the quantum is much more effective as his submissions are regarded as the main vehicle for transmitting government policy to the Commission.

(b) Criteria of Decision

One basic reason for their ineffectiveness, according to the advocates, is that the Commission has not yet spelled out any clear and determinative criteria of decision to which argument can be related. Indeed, they agree that this might even be impossible.

There have been two so-called criteria historically associated with the determination of the economic cases; (i) needs of the wage earner according to some accepted standard of living and (ii) the capacity of industry to pay for increases. 42/ In its decisions over the years the Commission has vacillated from one to the other and, with the exception of the years where the basic wage was tied to a consumer index, it is impossible to determine from the written decisions which criterion was applied and how it was done.

The competition between the two criteria has evolved into a debate on the Commission itself as to whether its function is to make economic policy decisions or to settle industrial disputes. Clarification of this was provided in writing in the 1967 decision with the President's statement that all members now agree that "when settling interstate industrial disputes (they) must consider the economic state of Australia and have regard to the economic consequences of other decisions". 43/ There is no agreement on how this is to be done and it would not be unfair to state that the economic implications will not be considered apart from the Commission's concern over continued confidence by the parties in the system nor apart from the existing social policies relating to distribution of income. 44/

No one, however, is quite sure just how the non-economic and economic criteria are to be applied. Professor Isaac has summed it up this way:

For many years capacity to pay has been advanced by all sides as the appropriate concept onto which to base general wage changes. But this concept has a chameleon like quality changing in meaning and significance depending on who uses the concept. This arises because the concept is often used without explicit reference either to the object of the wage adjustment or to the effects desired from any wage range. Consequently capacity to pay gives rise to different and often contradictory principles.

Thus, in one sense, the economy has the capacity to sustain any rise in the money wage level. In some of the South American Countries money wages have risen by 40% or more per annum for years on end. But what are these if such a rise in money wages on the price level, exchange rate, income distribution, productivity, political stability, etc. In another sense capacity to pay is limited by increases in internal productivity thus unadjusted for changes in terms of trade, if the object is price stability. However, if the objective is stability in the share of wages rather than stable prices some increase in prices may be consistent with capacity to pay. Moreover, if the objective is an increasing share to wages, even greater price rises may be tolerated. The wisdom of such a move depends on balancing the extent to which the share of wages can be increased against the consequences of price increases for the balance of payments for the fixed income sectors and productivity in general.

Quite clearly, the capacity to pay must be qualified by the economic, industrial and social effects to be sought and those to be ignored. By itself it can mean anything. 45/

(c) The Process of Decision

One thing is clear about the process of decision despite the tradition of giving written reasons in support of the decisions in the economic cases. The Commission's decision process is not one in which the result arrived at is by way of a reasoned application of existing criteria of decision. The absence of criteria, the complexity of the task, and the multiple character of the tribunal make such an approach infeasible if not impossible. And it is readily acknowledged that such an attempt is not made.

The desirability of agreement by the whole tribunal with its consequential enhanced acceptability provides an element of conflict that turns the decision process into a form of negotiation. Following the hearing the members of the particular Bench digest the material and reach a tentative view. Following this, a series of discussion and negotiating sessions are held in an endeavour to arrive at a unanimous decision.

The form of decision adopted in 1967 indicates that the Commission will no longer attempt to appear to be acting otherwise, and that it will abandon attempts to appear to be responsive to the arguments of the parties. It clearly reflects the negotiated or bargained judgment that in reality it was. 46/

2. Interest Arbitration: The Individual Cases

The so-called "economic cases" operate in a world of their own. They appear annually, or will from now on, and the decisions as to wage increases flow to every unionist in Australia. The process of the Commission in these cases is a form of incomes policy formation and for that reason it loses much of its value for this study. The "economic cases" however only comprise a small proportion of the arbitrations actually carried out within the Commonwealth Arbitration and Conciliation Commission. All of the lay Commissioners are continually arbitrating disputes over interests between individual unions and employers or groups of employers.

Most employees belonging to unions who are within the jurisdiction of the Commission are governed by an award made by an individual lay Commissioner. The "award" is very similar in appearance to the North American collective agreement. It is a general code of rights and duties with regard

to matters deemed fit for award regulation. Some idea of the typical award can be gained from a perusal of the 1952 Metal Trades Award.⁴⁷ It contains thirty-five clauses dealing in detail with the amount of the basic wage, the amounts to be added to the basic wage as "margins", hours of work, starting times, shiftwork, overtime, annual leave, duration and termination of the hiring contract, union rights, apprenticeship, sick pay and safety provisions. This format is almost identical to all the awards in the federal system.

Once an award is made it is binding as a "minimum" only until a new award is made and awards do not automatically terminate. When an application is made for a variation or for a new award, rarely are all the matters contained in the award in dispute. Sometimes all are agreed to prior to coming before the Commission in which case the Commission hands down a consent award. In most other cases too a majority of the items are agreed upon and settled either prior to instituting arbitration or in conciliation proceedings conducted either by the Commissioner or a Conciliation Officer prior to the arbitral hearings. Usually, only a few items remain in dispute for arbitration. These commonly include the quantum of the margin and other monetary matters.

(a) The Participation of the Parties ⁴⁸

The customary method for initiation of "interest arbitrations" is for the union to serve a log of claims upon the employers or multi-state employer involved or upon an Australia-wide employer association. When ignored or rejected, a "dispute" extending beyond the limits of one state is created. Upon notification the Commission will assume jurisdiction. The case will come before the individual Commissioner attached to the industry concerned

and he will customarily call a "compulsory conference". It is there that most "bargaining" and "conciliation" take place.

The posture of the participants in these cases is an adversary one although it has none of the formality of a judicial hearing. The party who served the log of claims, usually the union, takes the responsibility for carrying the burden of the case and substantiating its claims or some part of them. The claims create what is called an "ambit" and they are usually designed to provide room for variation for a number of years in the future. As a result, the real items in dispute are difficult to decipher. A claim is usually a catalogue of union aspirations for a number of years in the future.

Evidence of two general types is introduced. Information regarding comparability of terms and conditions of employees in similar jobs in similar industries as spelled out in other awards and by way of over-award payments 49/ is brought to the attention of the Commissioner. The other type of evidence is truly factual. Here the advocate attempts to show special circumstances in the type of work and conditions of employment to warrant variations from comparable terms and conditions. The most familiar form of this evidence is the "work value" assessment. This generally involves the Commissioner and advocates in a series of "on the spot" inspections. The Commissioner and advocates will proceed from location to location interviewing individual employees supposedly in typical or representative jobs. All of this is transcribed. The Professional Engineers' cases were "work value" cases. 50/ Some of the elements of work value taken into account in those assessments were "professional qualifications, experience, responsibility, management, supervision and co-ordination of effort, nature of the

work undertaken, conditions in remote and rugged areas, questions of safety involving persons, plant and structures, financial implications, lack of opportunity for private practice, promotional changes and the necessity for continuing study". 51/

At the hearing, following the inspections, further evidence is called and the employees interviewed are made available for cross-examination under oath. Needless to say some of these arbitrations can become extremely lengthy, involved, and complex. 52/ Following completion of this sort of evidence the advocates make submissions directed to obtaining the most favourable decision possible. The argument in these cases, however, is much more akin to "reasoned argument" and much more meaningful as a mode of participation.

(b) Criteria of Decision

The whole structure of the arbitration system in the Commonwealth is hierarchical and this yields a full complement of norms for the various terms and conditions of employment. The inner polycentricity of the matter has to some extent been disregarded for the norms derive from legislation on some terms, from key awards by Commissioners on others, and from determinations of either a Full Bench or a Reference Bench. Furthermore, the various industry basic awards are clustered and in the past have revolved around the Metal Trades Award although with the increase in professional and white collar unions some decentralization has set in. The product of this hierarchical structure is that the terms in awards are quite standard and that for most individual arbitrations many issues are pre-determined. The greatest room for creativity at the lay Commissioner level is in determining margins and variations from the norm to allow for special circumstances. Thus, with some sort of criteria with a stable content, reasoned argument and proofs are meaningful. Of course, the lay commissioners arbitrations for the large part follow patterns and norms and do not fundamentally alter or change them. The Presidential members retain the greatest

creativity. All of this is tied together in a general principle of "comparability." 53/

The determination of the margin for a particular job or group of jobs is usually based on an assessment of the "work value" of the job in question on the principle that jobs involving similar requirements should be awarded the same amount of pay. This is known in Australia as the principle of comparative wage justice. In a more general sense it is nothing more than comparability; that pay and other conditions of employment should be similar for similar jobs regardless of the industrial and regional location of the job. The principle is clear. It is the application and the imputation of money value to various jobs that causes some obfuscation. 54/

No very sophisticated job evaluation techniques are employed and as the comparisons become more and more abstract the criteria become less and less useful as guides to decision. The relativities of job classifications in the Metal Trades Award and the margin of the imaginary "fitter" provide the touchstone of what in theory should constitute a completely related and rational system. Once this arbitrary level is established some basis for comparability is provided. But its certainty and efficacy dissolve somewhat in practice.

Not only is it difficult to make comparisons but to know job content and to evaluate the elements of skill tends to be quite subjective. Although the form of the procedure is followed and although the criterion is generally clear, the variation in results from case to case can be considerable.

Furthermore, in recent years the Commissioners have tended more and more to give increases not in the form of margins which could upset long

established relativities within an industry and in other industries but rather as special loadings or allowances. The individual Commissioners have some discretion in this regard and their utilization of it has tended to distort the notion of comparability in practice. More and more the Commissioners are influenced by the market in fact and by the possibility of further industrial action if rises are not granted.

In theory the principle of comparative wage justice should provide some reasonable standard for decision. In practice, however, the factors to be considered in work evaluation and the difficulty of making rational comparisons tend to somewhat diminish its utility as a guide to decision. It provides outer limits only with considerable discretion between those limits. And the practice of making special allowances has further lessened the value of "comparability" as a standard to which argument can be related and evidence adduced. At least with regard to the monetary element in these interest arbitrations, the concept of comparable wage justice is to a considerable degree illusory. As a result, the "going rate" rather than "comparability" within the system often is a considerable determinant of the decision.

(c) The Decision Process

Not much in the way of objective analysis can be stated as to the decision process. The Commissioners sit alone and except for the possibility of an appeal to the Full Bench and the restraints of "comparability" they have a free hand in making their decisions. The lack of guidelines in money issues tends to keep most of the Commissioners slightly more conservative in their awards than privately they seemed prepared to grant. Some take cognizance of the impact of their decision on the future negotia-

tions between the parties. Others have personal preferences which become the main source of gossip between the advocates appearing before them. Others are influenced by the likelihood of a particular award preserving relative calm in the industry. To be sure, the key awards provide limits to the Commissioners' discretion but the limits are not so clearly definable that their discretion is substantially limited. The lay Commissioners "call them as they see them" and an aura of uncertainty usually surrounds any case dealing with work value, margins, and other monetary issues. 55/

The form of decision supports this generalization. The so-called "reasons" are often not much more than a statement on the relevant evidence, a summary of the arguments, a comment that all has been considered followed by a statement of the result. 56/ No attempt is made to trace out rationally the application of any principle to the facts. In "key" cases sometimes a statement of factors considered will be made but this customarily is the extent of the statement of "reasons" for decision.

A word should be added about appeals and references. If either the President or a Commissioner feels that a particular dispute is of such importance that it should be determined by a Full Bench the President may order that it be determined in that way. Similarly, if an appeal is brought from a decision of a Commissioner and the President feels that it is of sufficient importance to warrant a hearing by a Full Bench he may so order. The result of this is that leading cases on all matters are usually heard and determined in a manner much the same as in the "economic cases". These cases are the prime source of prevailing "norms". If there is any attempt to define standards and criteria of decision it is usually done in the statement accompanying these awards. The appeals and reference cases, however, are

few in number in comparison to the matters disposed of by individual lay Commissioners. 57/

3. A Note Regarding Administration and Enforcement

A third type of "arbitration" is intermingled with the "interest" arbitrations. Disputes arising during the currency of awards, (disputes that would generally be determined by an arbitrator in North America) are a constant source of friction and they are resolved in a number of ways. Some are submitted to tripartite Boards of Reference provided for in awards, many are dealt with by the lay Commissioner without much regard to the nature of the dispute or its "inter-stateness" and clear questions of interpretation are determined by the Commonwealth Industrial Court. However, a lack of procedure at the shop level often results in short stoppages or "stop work meetings", go slows or other forms of industrial action and this aspect of the system - industrial activity in these situations - is one of the serious weaknesses of the Australian system.

In situations in which awards have been breached, particularly where industrial action has been taken in contravention of a "bans" clause, the dispute can be determined by the Commonwealth Industrial Court and supported by the levy of a fine on both the individuals and organization involved. As these processes are not concerned with "interest disputes" and their arbitration, they are beyond the scope of this enquiry. The enforcement process however, will be further considered in connection with the following analysis of collective bargaining within the system. 58/

4. Summary

Although both the economic and individual cases whether heard and determined by an individual Commissioner or a Reference Bench are conducted in a manner that resembles an adjudication, the outward appearance is misleading. In the "economic cases" and the major "work value" cases there are no accepted criteria of decision. The parties recognize this and the members of the Commission are ready to admit that their decisions are not arrived at, nor limited by, rational application of criteria of decision.

To a somewhat lesser degree this is also true of the decisions made by the individual lay Commissioners. Although at first blush it would appear that the principle of comparability would provide a workable "guide" to decision, in practice this has not been entirely so. The vagaries and difficulties of assessment of work value and the multiplicity of factors to be considered tend to make the apparent efficacy of the standard illusory. Furthermore, the fact that the Metal Trades have not sought a reassessment of work value from a Full Commission until very recently has tended to make the premises of comparability and relativity obsolete and far removed from the going market rates. This has stimulated the use of special allowances and loadings by Commissioners in their decisions, with the result that the principle of comparability has been further rendered less appropriate. The Commissioners do exercise a considerable discretion and correlative the parties as a result have been further deprived of effective participation in the decision process. Uncertainty is usually present in these arbitration cases, a factor which in the recent past at least has been a real stimulant to direct negotiation.

COLLECTIVE BARGAINING AND INTEREST
ARBITRATION IN AUSTRALIA

Collective bargaining does go on in Australia. There are labour negotiations both within and outside the framework of the Industrial Conciliation and Arbitration Act. 59/ Whether within or without, however, the bargaining naturally is strongly influenced and shaped by the arbitration process. As a result, the factors influencing negotiations and the conduct of the negotiators varies considerably from the Stevens' model. Nevertheless, some analysis and examination of the inter-relation between bargaining and arbitration is worthwhile.

Before examining the various forms of on-going bargaining in Australia some general observations relating to the effect of the arbitration system on bargaining should be noted. It should be remembered that arbitration has been in operation for over sixty years in Australia and that it did precede collective bargaining as a basic method of industrial relations regulation. As a result, collective bargaining has not developed independently of arbitration. Furthermore, the structure of the trade unions and the organization of the employers' associations have been influenced considerably by the existence of the arbitration machinery. Both took their form in response to the needs created by arbitration and both have become institutions with highly centralized organizations much more suited to dealing with disputes through the medium of an arbitral tribunal than through direct negotiation. The awards have been developed in such a manner that one award usually covers many employers which has made it almost impossible in most cases for the employers' organizations to obtain the necessary consensus for dealing with unions directly. Unions on the other hand have

tended to be financially and organizationally weak. This has handicapped them seriously in direct dealings and has had the effect of making them dependent on arbitration. The union movement is just not equipped for large scale collective bargaining. They do not have either the staff or the finances.

The arbitral system, which deals with the basic wage and national margins case annually, has to a considerable degree removed the need for further self-help. Almost every year some increment has been passed on to every union member in Australia. The need for militancy and direct action has been lessened and has been made more difficult to convey to union memberships. Furthermore, the awards of the Commission have tended to stabilize a large number of the features of the employer-employee relationship leaving only a few matters — usually "work value" and "margins" — open to change by negotiation.

Finally, on the other hand, the failure generally to distinguish between "interest" adjustments (rule making, "rights" disputes, rule application) has had the effect of leaving the relationship open to a continuing rash of minor disputes. 60/ Grievance procedures have not been generally adopted. 61/ This shortcoming in the system of late has contributed to a movement by employers to attempt to settle their relations with unions through negotiations and to bargain "disputes procedures" into their agreements and awards. This, coupled with increasing pressure for over-award payments, has resulted in a new interest and increased incentive to resort to direct bargaining rather than solely relying on the arbitration. 62/

With these general comments in mind a survey of collective bargaining in Australia can now be made. Like the arbitration system, there are

several sub-processes of collective bargaining that should be considered separately. These are (a) collective bargaining outside the framework of the Commonwealth Conciliation and Arbitration Act, (b) bargaining leading to "consent" agreements registered under Section 31 of the Act, (c) bargaining for over-award payments, and (d) collective bargaining preceding either an award or agreement of the Commission.

1. Collective Bargaining Outside the Commonwealth System

Arbitration in Australia is not compulsory in the sense that it is required of every trade union employer potentially within the jurisdiction of the Commonwealth Commission. 63/ No union and no employer is required to register under the Act, a necessary condition to the application of the legislation. Surprisingly perhaps, almost all unions are registered either federally or under state legislation and therefore most employers are compelled to submit to arbitration. Only on rare occasions have unions either refused to register or obtain de-registration in order to "go it alone". A few have, however, and they have regulated their relations through direct negotiation and bargaining backed by the ability to resort to economic action. Two examples frequently pointed to as evidence of collective bargaining in Australia are the Broken Hill Mining Industry and the Melbourne Building Industry.

(a) The Broken Hill Mining Industry

Since 1920 the mining industry in Broken Hill, New South Wales, has functioned apart from the arbitration system and has been regulated by a series of triennial agreements. 64/ Following some bitter strife in 1920 the unions formed the Barrier Industrial Council and the mining firms formed

the Mine Managers' Association primarily to enable them to carry out direct negotiation. They were successful in establishing a negotiated agreement and it has been the basis of their relationship since that time.

This phenomena, however, is partly a product of physical location and the nature of the industry. Broken Hill is a mining town well inland from Sydney and very much isolated from the rest of Australia. Both mine owners and unions clearly perceived their inter-dependence and, if not equal, considerable bargaining power and both mine owners and miners are equally dependent upon the world markets for lead and other minerals. Finally, the above average prosperity of the industry has enabled the mine owners to pay wages well above the Australian average and the "lead bonus" established by the first agreement has in effect removed wages as a central bargaining issue. A disputes settlement procedure established in the initial agreement has facilitated resolution of disputes during the operation of the agreements and this together with superior wages had led to the development of a tradition of industrial co-operation.

Walker has summed up their experience as "a proud heritage of independence and peaceful negotiation and constructive co-operation has developed. Over the years bitter conflict gave way to an increasing measure of conciliation and mutual confidence although not to the point of establishing complete harmony. Stability and "give and take" with a minimum of work stoppages are the essence of the pattern of industrial relations at Broken Hill". 65/

Despite this independence from the arbitral machinery, however, its influence has been felt. The Broken Hill Agreements are built upon and tied to the national basic wage and margin decisions. Margins for the

skilled trades in Broken Hill are based upon the Federal Metal Trades Award and the seniority clause in the agreement was borrowed from one of the rulings of a lay Commissioner. 66/ And it has been suggested that the stability of the Broken Hill agreement has been to some extent due to the fact that there was always the alternative of arbitration and the loss of the lead bonus and treasured independence should bargaining fail to provide an agreement. 67/

(b) The Melbourne Building Industry Agreement

The Melbourne Building Industry Agreement concluded several chaotic years in the building industry in the early fifties. 68/ Melbourne was enjoying a building boom due to its having been selected for the forthcoming Olympic Games and the demand for labour created pressure for over-award payments, a set of circumstances that led to endless strife. Out of this came a bargained agreement settling the matter of over-award payments and providing a dispute settlement procedure for disputes arising during the currency of the agreement.

The demand for labour, however, was not the only cause of strife. Some tradesmen were covered by the State Wages Boards whereas others were governed by Federal awards and the latter awards provided considerably higher wages. The result was that tradesmen would be under one rate for one job, another for the next and so on. Thirdly, the deregistration of one building industry union undermined the Trades Hall Council's control over jurisdictional disputes and these came to be resolved by industrial action. All of these factors contributed to a situation where some industrial action was implemented daily. During the hearing of a dispute before Conciliation

Commissioner Chambers on August 9, 1954, Mr. George Polites, at that time industrial advocate for the Victorian Employers' Federation, complained, "it is not untrue to say that on each and every day some dispute arises on a job in the building industry in the (Melbourne) metropolitan area". 69/ When things reached crisis proportions the Victorian Employers' Federation, which was able to control the main group of master builders, and the Trades Hall Council arranged a cease fire and in two months worked out an agreement. Like the Broken Hill agreement it too, however, was based upon arbitral awards. The 1956 agreement stabilized over-award payments and developed a grievance procedure. It made no attempt to improve upon either State or Federal awards but simply worked out a formula to eliminate the inconsistencies. 70/ Subsequent agreements have focused primarily on the quantum of over-award payments and negotiations have been carried out under the shadow of a strike in much the same way as is done in North America. None were underway at the time of this study and regrettably a detailed history could not be obtained.

2. Consent Agreements and Awards

Section 31 of the Commonwealth Conciliation and Arbitration Act provides that agreements between trade unions and employers may be registered or certified under the Act and that they will be regarded as having the same effect as an Award of the Commission. The only difference between negotiating an agreement and then presenting it for certification and negotiating an award is that in the latter the Commissioner is seized with the dispute and can readily be brought into action if negotiations break down. This distinction would appear to be in large part illusory as in the one consent agreement and its negotiation examined the parties kept their Com-

missioner fully informed at all times and on occasion it appeared as if he would be given jurisdiction over the dispute by the formal service of claims. In any event this certification procedure has only been resorted to on a few occasions. T1/

As with the agreements bargained outside of the arbitral system, in which the parties on both sides organize themselves for an attempt to develop an agreement or a consent award without the assistance of the Conciliation Commission, there are usually two matters in dispute. Usually there is disagreement over the quantum of an over-award payment and a history of stoppages during the operation of the past awards. The employers are often strongly motivated to stabilize the amount of over-award payments and fix them for a definite future period of time. In addition, they usually are desirous of a dispute settlement provision — a grievance procedure to function while the agreement is in operation. And as with the two earlier cases, successful collective bargaining seemed only to exist where the employers were well organized and where the unions could operate together under the direction of the central authority, either the Trades Hall Council or the A.C.T.U. It is largely for this reason that two of the most recent examples, one of a consent agreement and the other a package of consent awards, were in the Oil Industry and Pulp and Paper Industry. T2/

(a) The Pulp and Paper Industry Negotiations

In the Pulp and Paper Industry there are only a few large producers in a heavily protected industry. The employers are well able to pass on increased costs and they, as a matter of policy, planned to be well above the average in their wage policy. In return, however, they were anxious

to secure a workable disputes settlement provision and some assurance that their production would go on uninterrupted for the two years that the agreement would be in operation.

The several unions involved were associated through the A.C.T.U. and they shared the problems arising from the loss of control of some of the plants to "shop committees" with the employers. The official union organizations and the employers were both disposed to reaching an agreement with some sort of disputes-resolution machinery for this reason alone.

The meetings in this set of negotiations were short and formal. Some threats of industrial action were made but none were taken too seriously. The employers knew that their package was attractive and the union delegates realized that it would be difficult for them to secure much more than the companies were offering. Furthermore, the alternative of arbitration would mean the loss of the over-award gains already made and loss of the automatic sliding adjustment tied to the Federal "economic cases" which were already operating in their past agreements. Although the negotiating conduct of the employers was not blatantly "take it or leave it", in effect this was their negotiating stance.

(b) The Oil Industry Negotiators

The Oil Industry negotiations were much the same although there the employers' negotiators handled the negotiations in a manner that appeared to reveal more clearly their superior bargaining power. The Oil Companies' policy was to pay premium rates, stabilize over-award payments for a fixed period of time and to secure a grievance procedure. Prior to negotiations they made thorough wage studies and determined the package to be offered

to all unions. They selected a consent award form on the theory that if negotiations did break down they would be able to introduce the Commission much more quickly which would speed up obtaining a "bans" clause and bring the penal power into play. Basically the Oil Companies adopted a form of "Boulwareism" bargaining and the unions were left almost powerless with a strong feeling of frustration. One member of the union negotiating team commented that it would be almost impossible to work up enthusiasm for a strike with the sort of offer the Oil Companies were prepared to agree to. Furthermore, the union negotiators believed that the Commissioners would not feel restrained in granting a "bans" clause when the terms of the Oil Companies' offer were better than any awarded by the Commission.

As with the Pulp and Paper Agreements the format and many of the non-monetary terms and conditions of the Oil Companies' awards followed the pattern established by the Commission. The basic wage and margins of the Commission were adopted; all that was added was an over-award payment provision and a viable dispute settlement procedure.

3. Over-Award Bargaining

The two situations considered above largely related to the quantum of over-award payments and negotiations rather than arbitrations and were motivated, at least from the employer's point of view, by a desire to stabilize over-award payments and secure uninterrupted production. The major difference between those situations and the ones to be considered is that, in these, bargaining is carried out primarily if not solely for an over-award payment. No formal agreements are made and organized negotiation is the exception rather than the rule. In recent years the short supply of labour in many locations, particularly a shortage of skilled tradesman in

the large cities has created a situation in which employers have been in competition to secure employees. This has given the unions raw bargaining power which they have not failed to exercise. B/

It is hardly correct, however, to term the campaigns for over-award payments "collective bargaining" negotiations. 74/ The usual case 75/ involves a demand for an increase followed by a campaign involving various sorts of economic action, "stop work" meetings, bans on overtime, short stoppages, slow downs and the like if the demand is not promptly met. It is more akin to a campaign of guerrilla warfare than formal collective bargaining negotiation. If the state of the labour market is one of short supply, and if the employer approached is especially vulnerable, the demand is met. Once one employer in a particular area has succumbed this frequently results in the others following suit. There is generally no agreement in writing and no term to the pact. It is not formalized in any way and can be re-opened at any time.

The only counteraction available to employers is to refuse to give in to the demand and to apply to the Conciliation and Arbitration Commission for a "bans" clause and then to the Industrial Court for relief. Typically, the employers' associations involved will apply to the Commission and request conciliation. From this they will take the dispute to the Commissioner and request an anti-strike clause be added to the award. If the union persists in taking industrial action this will frequently be provided at least should the attempts at conciliation fail. If they do order a "bans" clause written into an award the next step of the counter-attack is to bring an action in the Industrial Court for an injunction restraining the union from further breaches of the award. In this way the threat of

serious and expensive fines is made real and is brought to bear on the union. Then for the first time the union is truly conflicted and some sort of agreement can be reached. If no agreement can be reached and continued breaches of the "bans" clause persist, the final step is to prosecute the union and the members involved in the illegal stoppages. Fines can be imposed up to \$1,000.00 a day, and they frequently are, much to the chagrin and annoyance of the Trade Union Movement. 76/

Although the various steps are contemplated by both the union and employer negotiators this over-award bargaining goes on quite apart from arbitration. The Commissioners generally will not as a matter of policy arbitrate disputes for over-award payments unless they are assured that their decisions will be accepted. Any arbitration undertaken is really consent arbitration. There being no real alternative to arbitration, the negotiations, such as they are, are really carried out against a background of direct action countered by the possibility of prosecution and fine. The settlements arrived at in this way are determined in large part by the state of the labour market and the bargaining power of the parties derived from the market. As a process of decision it is quite unsophisticated and the results reflect the economics of the labour market more than anything else.

4. Bargaining Within the Arbitration Commission Structure 77/

In the cases discussed above arbitration was always a possible alternative but in reality it operated more as a coercive tactic by the employers than by the unions. By threatening to invoke arbitration, employers could effectively deprive the unions of their over-award gains for, generally speaking, the employers were prepared to offer much more than any Commis-

sioner would award. Thus, the examples above are of little value insofar as the inter-relation between arbitration and bargaining is concerned. The threat of arbitration in the situations discussed above did not have the effect of "conflicting" the employers although it had that effect on the unions. In the situations contemplated here, arbitration is an alternative to both parties and to a greater extent a threat of arbitration does impose costs of disagreement on both the union and employers. In the bargaining envisaged here the Commissioner has jurisdiction over a particular dispute and it takes place prior to his conducting a formal hearing or prior to conciliation either by a Conciliation Officer or the Commissioner himself. As a matter of general practice conciliation meetings are taken prior to any hearing by a Commissioner and generally a considerable portion of the claims are settled at this stage.

As mentioned earlier the arbitration system has established a number of normative terms and conditions of employment quite clearly and the basic wage, hours of work, and long service leave are all determined by the Commission in Presidential Session. Not all matters are settled in this way, however, and among the main ones heard and dealt with by the individual commissioners are overtime rates, margins, industry allowances and other fringe benefits. And again as mentioned earlier the practice of the Commissioners has created sufficient flexibility and uncertainty to allow room for real negotiation.

Again, of course, the intra-organizational conditions necessary for successful bargaining had to be present and the most frequent cause of unsuccessful attempts at serious negotiation seemed to be the employers' associations inability to obtain a consensus from the various employers

involved in making offers and negotiating settlements. Often the disputes covered dozens of employers in a number of states and this created serious problems for the negotiators on the employer side. Often they were forced to arbitration simply because of these intra-organization difficulties. The award being a "one union award" did not raise such problems although on occasion a lack of branch control created a similar situation for the union negotiator. This unwieldy employer structure was often mentioned by industrial relations people as the single most influential factor explaining the low incidence of agreement on the crucial issues of margins and money fringe benefits in these circumstances.

In the negotiations studied, the costs of disagreement were made up of a variety of factors. The physical cost of arbitration was a serious factor for union negotiators who were often overburdened with work. Both sides found a cost in the uncertainty of arbitral decisions although this varied from case to case. The possibility of direct strike action or at least short stoppages and harrassment tactics was ever present and it too created costs of disagreement and added to the conflict-choice position of both sides, in particular the employers. The coercive tactics of the union and employer negotiators were built upon this power structure.

The course of negotiations observed and studied followed Stevens' model and the Singapore experience in a general way but with a greater emphasis on tactics of persuasion utilizing arguments of comparability. Coercive tactics were not heavily relied upon because of the ready availability of arbitration and partly because of the general attitudes of many of the negotiators on both sides of the table. The belief that threats and direct action were incompatible with the system of conciliation and

arbitration established by the Act was quite pervasive. When the Commissioner entered the picture and attempted to mediate, his influence was considerable both by way of persuasion and by veiled threats in the form of a hint to one side or the other as to how he would likely decide if no agreement was reached. The Commissioner's influence was also augmented by the fact that the parties and he were in a continual ongoing relationship and in most cases the Commissioners enjoyed considerable personal respect and prestige.

Rarely was there any sort of "later stages" negotiation as envisaged by the Stevens' model. Deadlines were never set and the sort of negotiation that might be expected in the later stages did not clearly develop.

Although the negotiations studied did resemble Stevens' model in that there were forces operating which brought the parties into conflict and thereby induced negotiation and the negotiatory responses of concession and compromise, the cost of agreement was rarely excessive. Rarely was there much to lose by going to arbitration and if a problem became difficult the usual thing was just to leave it to the Commissioner. Furthermore, it appeared that it was the likely arbitral result and inevitability rather than conflict that resulted in agreement or partial agreement at this stage although as always there were exceptions. 78/

SUMMARY

1. The Arbitral Process

The Australian arbitration experience is useful as an indication of the working of the process particularly of one case in an adjudicative mould. And by and large it tends to bear out the view that "interest disputes" are not readily handled by the adjudicative process of decision.

The participation of the parties in the decision, at least in the national economic cases, by way of argument and the presentation of proofs was generally considered of little value. There are no identifiable criteria to which argument could be rigourously and rationally directed. The factors to be weighed in decision are numerous and of a rather nebulous character. 79/ And fundamental to the whole process, as observed by Higgins, is the necessity for the Commission to make a forecast of future economic conditions. 80/ Furthermore, there was general agreement that outside influences such as displays of militancy by unions and statements of doom by business leaders were of some considerable effect on the Commission. And all concerned felt that the position adopted by the Commonwealth advocate was extremely significant. Finally the multiple character of the Commission in these cases and a clear belief that unanimity enhanced the acceptability of decisions all tended to render the argument of the parties relatively ineffective.

With regard to the Full Bench decisions on basic work value norms and relativities similar views were indicated. In developing some new basis of differentials for skill it was clear that a general "standardless" and open judgment was required. This being so, the parties' effectiveness in argument and in presenting proofs was limited. There is no doubt that the participation of the parties was more effective in the individual cases before the lay Commissioners where some standard of comparability could be utilized although the difficulties involved in its application left much to be desired. And of late, due to the fact that a fundamental work value assessment by a Full Bench has not been taken for some years, 81/ the lay Commissioners

have felt disposed to add various allowances adding further uncertainty and thereby removing further what objectivity remained in the concept.

By way of corroboration of the belief that in the national economic cases and Full Bench awards participation by way of reasoned argument and presentation of proofs is ineffective is the widespread practice of unions and to some extent of employers to surround a case with campaigns of pressure. Often the unions call nationwide stop-work meetings to keep the Commission aware that its decisions are not taken lightly. Indeed, on some occasions it was remarked that a one-day stoppage was better than a hundred days of argument. 82/

The wide and growing prevalence of over-award payments corroborates the judgment that the nature of the problem of national wage fixation is "polycentric" in nature. It supports the view expressed herein that it is difficult and unworkable to subject the wages, and terms and conditions of employment to a system of formally organized "rights" and "wrongs".

Despite these difficulties and strains, however, the system functions. It has been a long established institution and has resulted in shaping the organization of both unions and employers into bodies that are dependent upon its existence. And perhaps of even more importance, it has resulted in groups of persons skilled in arbitration procedures who have acquired a vested interest in its continued operation. It is very much the product of Australia's cultural, economic and industrial development and however well suited it is for Australian purposes it has little to recommend its importation to foreign industrial relation systems.

2. The Acceptability of the System and Strike Activity

There seems to be a growing feeling of frustration and dissatisfaction with the arbitration system, particularly among the younger trade unionists. It is generally criticized as becoming more and more cumbersome and further and further removed from the realities of Australian life. There is a widespread belief that the awards of the Commission do not adequately reflect the economic prosperity and growth that Australia has experienced over the past few years and the idea of the Commission being an arbiter of a national incomes policy has not been fully accepted. The failure of the Commission to handle disputes adequately during the currency of awards, both disputes involving over-award payments and disputes arising out of the operation of awards has resulted in heavy criticism from employers. Some people have commented that the Commission is entering a period of crisis that could conceivably lead to its dismantling. Indeed, a student of labour relations in Australia recently had this to say:

I don't know what you have written in your study of compulsory arbitration in Australia but you may have been here a few months too early. The system has got itself into so much trouble on national issues in the past few months that even respectable people are talking about collective bargaining.

(1) December 11th - the Full Bench gives the fitter \$7.40 and varying amounts to others. This was the long awaited Metal Trade judgment dealing with work value and margins generally. However, the award says (a) that employers can absorb this increase in their over-award payments and (b) the increases are only for the tradesmen in the metal trades, that there is to be no automatic flow to everyone (an overnight change of a practice that had been operating for over 25 years) in their awards and industries.

Chaos wasn't the right word. In January and February there were over 300 separate strikes (many more threatened) and the fines on unions amounted to \$70,000 plus costs.

(2) Then in February a different Full Bench cut into the increase by 30% — a cut in money wages — you can imagine what happened in March! The side effects have also been fascinating — electrical fitters getting more than their supervisors. You can imagine how the white collar unions feel — we have already had two full day blackouts in power generating due to white collar strike action in the State Electricity Commission — and there will be more to come. 83/

The increasing activity of the unions in exploiting their enhanced power arising from the chronic labour shortage by seeking over-award payments has tended to leave the Commission further and further from the mainstream of wage determination. The recent Metal Trades Award seems to be an attempt to change this but it will be difficult to do. Furthermore, its activity in supplying "bans" clauses and enforcing them although with only marginal success, 84/ has been a constant source of irritation to the trade union movement. They feel that it unfairly curbs their ability to use self-help to obtain better terms and conditions, benefits that the Commission itself has failed to provide through arbitration. Where this will lead is an open question but there would seem to be a growing interest in utilizing collective bargaining and relying less upon the traditional method of arbitration to deal with interest disputes.

It is of particular interest to note that strike activity in Australia has not been significantly lessened by the presence of arbitration. Strike action, particularly in the form of a series of short harassing stoppages is widespread. One commentator has observed:

... the system of compulsory arbitration in spite of its many failings and its impotence to apply sanctions on a large scale has been responsible for mitigating the "trial of strength" feature of collective bargaining in the determination of terms of employment. The development of centralized wage determination with nation-wide application of key wage elements has discouraged the use of the strike weapon in the process of wage determination.

However, compulsory arbitration has not prevented other types of strikes. These are more in the nature of protests against arbitration awards regarded as unacceptable by sections of workers; protests against unsettled or unattended grievances and protests of a political (non industrial) nature, e.g. the enactment by the government of an anti-communist bill, foreign policy, etc. The first two types of protests may well be aggravated by compulsory arbitration itself. The third type may be accentuated by communist leadership.

These protests have one thing in common — they are short in duration. Thus it is arguable that the system of compulsory arbitration has tended to modify strike action in the direction of abundant but short-lived protests. New industrial issues have added to these protests. And the period of full employment has provided a favourable environment for the full releases of these forces of protest. 86/

There are many causes of conflict and strike activity in Australia, but the substantial incidence of strike activity would seem to point to two general conclusions. One is that the arbitration system in Australia has not enjoyed success in eliminating industrial conflict. Secondly, it raises the whole question of the sociology of industrial conflict and whether it is possible at all in an industrial society to eliminate totally this form of expression of conflict.

3. Arbitration and Collective Bargaining Negotiations

The Australian experience is far less instructive on the question of the compatibility of collective bargaining negotiations and third party decision. Arbitration has always been accepted as the main process for interest dispute settlement with the result that resort to collective bargaining has been fragmentary and where resorted to strongly effected by the operation of the arbitral system. Although there is an increasing tendency to deal directly rather than involve the Commonwealth conciliation and arbitration machinery, tradition, organizational difficulties, and a

lack of interested and skilled personnel hamper its development.

One form of negotiation observed in the Australian context of relevance to the question of arbitration as a sequential variant to collective bargaining negotiation was where the parties negotiated within the system and where a lay Commissioner was ever present as an alternate to negotiation. In that respect two general situations were observed. In one the employers were wage leaders and used this fact to obtain firm agreement on over-award payments and dispute settlement procedures. There the bargaining appeared to be a form of Boulwareism. The unions found themselves in positions in which either a strike or resort to arbitration would in all likelihood remove the benefits then enjoyed. In effect they were in a "take it or leave it" position with the only alternative being acceptance. The second general situation was not so structured and in it there was evidence of some negotiation. How pervasive this is over the whole system is difficult to ascertain. The official statistics are not designed to reveal either wholly or partially negotiated awards of the Commission. However, in the instances investigated there was evidence of some conflict-choice and negotiation. The costs of arbitration generally grew out of the time-consuming nature of the process and the uncertainty as to what a Commissioner might award by way of a margins differential or an industry allowance. In cases in which this was significant there seemed to be a real desire to negotiate. But in many cases the criteria indicated relatively clearly what the arbitral result would be and agreement often was achieved on these issues through a realization that arbitration would be futile. In some cases the possibility of strike activity added another perspective to the "costs of disagreement" and it is possible that this feature really provided the negotiation environment and not so much the cost and uncertainty of arbitration.

As a result, the Australian experience is not at all conclusive. It indicates that the desire to reach agreement and to settle issues is not likely to be fully supplanted by arbitration in any form. However, the whole environment and structure of arbitration in Australia makes it difficult to reach any firm conclusions in this regard.

TABLE V

INDUSTRIAL DISPUTES

INDUSTRIAL DISPUTES (a): CAUSES, AUSTRALIA, 1961 TO 1965 85/

Cause of Dispute	1961	1962	1963	1964	1965
Number of disputes—					
Wages, hours and leave	123	290	279	320	426
Physical working conditions and managerial policy	525	707	748	758	735
Trade unionism	66	92	115	136	101
Other	101	94	108	120	84
Total disputes	815	1,183	1,250	1,334	1,346
Workers involved (b)—					
Wages, hours and leave	114,125	133,312	171,551	235,846	268,105
Physical working conditions and managerial policy	102,125	179,321	142,998	191,354	143,111
Trade unionism	13,797	15,243	22,251	31,670	17,722
Other	70,310	25,977	75,908	86,758	46,106
Total workers involved	300,357	353,853	412,708	545,628	475,044
Working days lost—					
Wages, hours and leave	248,864	194,427	274,901	556,948	528,722
Physical working conditions and managerial policy	261,454	274,091	233,502	257,062	235,542
Trade unionism	34,021	22,418	23,268	33,392	18,873
Other	62,472	17,819	49,897	63,956	32,732
Total working days lost	606,811	508,755	581,568	911,358	815,869

(a) Refers only to dispute involving a stoppage of 10 man-days or more.

(b) Includes workers indirectly involved.

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- 1/ Louis Hartz, The Founding of New Societies, New York, Harcourt: 1964, Ch. 8, Richard N. Rosecrance, "The Radical Culture of Australia, pp. 275-6.
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- 4/ Rosecrance, supra, n. 1, p. 282-3.
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- 7/ Ibid. p. 304.
- 8/ Hutson, supra, n. 3 at pp. 32-35.
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- 13/ Ibid. p. 79. As well, this data was supplemented by an unpublished manuscript by I.G. Sharp, dealing with the history of trade unionism in Australia.
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- 17/ See generally, Martin, "Australian Professional and White-Collar Unions, The Journal of Industrial Relations, Vol. 5, No. 1 (1965)

- 18/ Generally, see Rawson, supra, n. 9.
- 19/ See, Isaac & Ford, supra, n. 10, pp. 93-95.
- 20/ There has been very little data published on employer organization in Australia. By far the most comprehensive and informative is the "Introduction" to Part III by Isaac & Ford in their book "Australian Labour Relations: Readings", supra, n. 10, pp. 247-264.
- 21/ Industrial Information Bulletin, Department of Labour and National Service, Jan. 1966, p. 103.
- 22/ Supra, n. 20, pp. 255-56.
- 23/ Ibid.
- 24/ Supra, n. 3, pp. 55-56.
- 25/ See generally, Foenander, Industrial Conciliation and Arbitration In Australia. Melbourne, Law Book Co.: 1959, pp. 3-34.
- 26/ For a brief summary of the state arbitral systems see Portus, The Development of Australia Trade Union Law, Melbourne, Melbourne University Press 1958 at pp. 117-120, and see, O. Dea, Industrial Relations In Australia, Sydney, West Publishing: 1965, pp. 51-77.
- 27/ Portus, "Aspects of the Commonwealth and State Division of the Industrial Power" The Journal of Industrial Relations, Vol. 5, p. 1 at p. 9 (1963).
- 28/ Ibid. p. 10.
- 29/ The following is based on a short summary in Hutson, supra, n. 3, pp. 55-61.
- 30/ Ex Parte Boilermakers Society of Australia — commonly known as the Boilermakers Case (1957) A.C. 288.
- 31/ See the Annual Report 1966 of the President of the Commonwealth Conciliation and Arbitration Commission.
- 32/ Australia Year Book, 1966, p. 345.
- 33/ Ibid.
- 34/ Ibid.
- 35/ Ibid. p. 346.
- 36/ Supra, n. 3, p. 60.
- 37/ For a basic analysis see Hawke, "The Commonwealth Arbitration Court Legal Tribunal or Economic Legislature" in Isaac & Ford, Australian Labour Economics: Readings, Melbourne, Sun Books: 1966 at p. 33.

38/ 1967 Basic Wage Case as yet unpublished.

39/ Ibid.

40/ The following is based upon a series of personal interviews with the advocates for all parties and upon a personal investigation of the Commission's Records.

41/ Transcript of Proceedings, 1967 Total Wage Case, pp. 470-71.

42/ For a brief summary see Isaac & Ford, supra, n. 37, pp. 8-10.

43/ See Isaac & Ford, supra, n. 38.

44/ Ibid.

45/ Isaac, "The Federal Basic Wage - Margins Case, 1965", The Journal of Industrial Relations, Vol. 7, p. 225 at pp. 230-31.

46/ The above is based on personal interviews and a comparison of some of the earlier National Wage case judgments with the 1967 "pronouncement". In the earlier cases a much more serious attempt at rationizing their result was made by the members of the Commission.

47/ Printed at 73 Common. A.R. 413 (1952), and see Appendix C.

48/ The following is based primarily upon personal observation and interviews with several union and management advocates.

49/ The payment of wages in excess of those required by arbitral awards has become more and more common in Australia and although the Commission in the General Motors Margins Case eschewed the propriety of considering the level of over-award payments in making margin decisions, several commissioners were quite frank in stating that they considered this factor in their awards.

50/ Commonwealth Conciliation and Arbitration Commission, Professional Engineers Decisions - 15 June 1961.

51/ McGarvie, "Principle and Practice in Commonwealth Industrial Arbitration After Sixty Years", 1 Fed. L. Rev. 47 at 75 (1964).

52/ e.g. Hutson, supra, n. 3 at pp. 147-8 describes the procedure as follows:

An illustration of the work that can be involved was a minor application by three unions to obtain increased margins for the small group of tradesmen employed on a new signalling system installed by the Victorian Railways. This was argued on a work-value basis, and involved twelve days of inspections at Melbourne and country locations by a Commissioner attended by four union officials and two witnesses, fourteen days of hearings spread over a period between 10th December, 1963, and 24th September, 1964,

the services of the advocates from three unions plus one from the employer with an assistant, the attendance of union and employer witnesses at hearings and inspections, the preparation of a number of exhibits by the unions, the holding of conferences with witnesses, and transcript covering 480 pages.

- 53/ For a sound basic analysis see McGarvie, "Principle and Practice In Commonwealth Industrial Arbitration After Sixty Years", 1 Fed. L. Rev., pp. 47-94 (1964).
- 54/ See, Kerr, "Work Value", Journal of Industrial Relations, Vol. 6, p. 1 (1964).
- 55/ This description is based primarily on personal interviews with a number of advocates, union officials, management association representatives and commissioners.
- 56/ Clerks (Oil Companies) Award, 1966.
- 57/ In 1966 there were 82 awards and 414 variations made by law commissioners. Only 16 were appealed: Tenth Annual Report: The President of The Commonwealth Conciliation and Arbitration Commission, p. 127.
- 58/ See, infra, p. 169.
- 59/ For a brief comment see Roberts and Brissenden, eds., The Challenge of Industrial Relations in the Pacific-Asian Countries, Honolulu, East West Centre Press: 1965, Ch. 5, Laffer, "The Working of Australian Compulsory Arbitration", pp. 63-66.
- 60/ Brissenden, The Settlement of Labor Disputes on Rights in Australia, Los Angeles, Institute of Industrial Relations, University of California: 1966, pp. 113-114.
- 61/ Ibid. p. 115.
- 62/ See, Laffer, supra, n. 59 at p. 66.
- 63/ See generally Sykes, "Labour Arbitration in Australia", The American Journal of Comparative Law, Vol. 13, pp. 217-18.
- 64/ This analysis of bargaining in the Broken Hill Mining Industry is based on Walker, Industrial Relations in Australia, Cambridge: Harvard University Press, 1956.
- 65/ Ibid. at p. 85.
- 66/ Ibid. pp. 134-5.
- 67/ Ibid.
- 68/ See generally de Vyver, "The Melbourne Building Industry Agreement", The Journal of Industrial Relations, Vol. 1, pp. 7-19.

- 69/ Ibid. p. 7.
- 70/ Ibid. p. 15.
- 71/ For example in 1966 only 22 agreements were certified whereas there were 82 awards and 414 variations to awards made: see 1966 Annual Report: The President of the Commonwealth Conciliation and Arbitration Commission, p. 127.
- 72/ Case histories were compiled in both instances. The following is based on that material.
- 73/ See generally, Isaac, "The Prospects for Collective Bargaining in Australia", The Economic Record, Vol. 34, No. 69, Dec. 1958.
- 74/ See the general approach outlined in Hutson, supra, n. 3 at pp. 101 to 104.
- 75/ The following is based on several case histories of "over-award" payment campaigns by the A.E.U.
- 76/ See the interesting account in Hutson, supra, n. 3, pp. 220-229.
- 77/ Again, in this part much of the material is based on personal interviews and case studies.
- 78/ One case study involving the Transport Workers Union and the Milk Distributors in Victoria was especially interesting. It provided a clear exception as real bargaining was carried out. Firstly, the employer's representative was successful in holding his people to his position. Second, the award had fallen away back and a substantial increase was inevitable. Thirdly, there was considerable uncertainty as to what the Commissioner would give as an increase which effected both the union and management representatives. Finally, the union officials were busy and the thought of another arbitration was quite repugnant to them. In the end result, at the last minute, following a short strike an agreement was reached and both sides believed they had done better than if there had been an arbitration.
- 79/ See, Isaac, supra, n. 45 at 230.
- 80/ Higgins, "Wage Fixing By Compulsory Arbitration", Social Research, p. 335 at p. 368.
- 81/ Since the writing of this paper such a study of the Metal Trades has been completed.
- 82/ See, Hutson, supra, n. 3 at pp. 126-128.
- 83/ From a private letter to the author, April, 1968.

- 84/ For a scholarly assessment see Isaac, "Penal Provisions Under Commonwealth Arbitration", Journal of Industrial Relations, Vol. 5, p. 110 (1963).
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- 86/ J.E. Isaac quoted in A.M. Ross and P.T. Hartman, Changing Patterns of Industrial Conflict, New York, John Wiley: 1960, p. 149.

CHAPTER IV

INTEREST ARBITRATION IN NORTH AMERICA

Interest arbitration systems in both the United States and Canada have been the exception rather than the rule. 1/ Collective bargaining has always been the main technique or process for regulating labour-management relations and determining their disputes over interests. Consequently experience with interest arbitration processes is limited and the empirical data relating to the various questions associated with interest arbitration are even more fragmentary and rare. There is some scholarly consideration of the forms and processes of interest arbitration on collective bargaining negotiations.

This section summarizes the key American experience, including the operation of the War Labor Board, post-war ad hoc arbitration, and some of the State emergency dispute arbitral experience. In Canada there has been some experimentation with interest arbitration but it is limited. Empirical study of the working and effect of interest arbitration on bargaining appears to be limited to Professor Arthurs' study of the Ontario Hospital Arbitration Act. 2/ The Cunningham study of the New Brunswick experience, although purporting to deal with "compulsory arbitration" focuses primarily on the arbitration of disputes arising out of the operation and application

of collective bargaining agreements and not on the arbitration of interest disputes. 3/

THE NATIONAL WAR LABOR BOARD 4/

1. Background

To properly appraise the National War Labor Board's effort in settling disputes (and stabilizing wages) during World War II the numerous special factors in existence at the time must be remembered. Although the United States became involved in the war directly only on December 11, 1941 and although the war never touched the American mainland, Pearl Harbor united the country to a remarkable degree. Despite differences over domestic policy the war effort was primary and no strategic group in the nation opposed it. After Pearl Harbor many of the top labour leaders pledged voluntarily that labour would refrain from strikes and a meeting of top labour and management leaders which was convened by the President agreed that there should be no strikes and lockouts during the war and that a tripartite board should be established to decide finally all labour disputes not settled through direct negotiation. 5/

Secondly, during the defence period and at the time of Pearl Harbor the American economy was under-employed. The problem of inflation developed only gradually and neither manpower nor prices had to be frozen to assure production. And because the war did not touch the mainland no significant sector of the population was required to make important sacrifices.

Thirdly, the Wagner Act had only been in existence for a few years and generally speaking labour-management relations were immature at least by way of comparison with the nineteen-sixties. The unions were generally

suspicious of management and although they were growing rapidly union status was the major question in many industries in 1941. While many A.F. of L. unions had won the closed shop, the key C.I.O. unions were struggling for security, and even the grievance machinery in many plants was imperfectly established. 6/

2. The Machinery of the N.W.L.B.

As the defence program in 1940 developed, strikes in crucial industries led to the establishment of the National War Mediation Board. 7/ It was a tripartite agency with no authority to order settlement. Its only power was to issue public recommendations which could result in government seizures if not accepted. But in one case, when the Board declined to award the union shop to the United Mine Workers, 8/ the C.I.O. members on the N.W.M.B. withdrew and the utility of the Board was effectively ended. By this time, however, Pearl Harbor had taken place and the National War Labor Board was about to be established.

The new board was tripartite in character and was given the power finally to determine disputes. The procedures for the administration of the no-strike, no-lockout agreement were established by Executive Order as follows:

(a) The parties shall first resort to direct negotiations or to the procedures provided in the collective bargaining agreement,

(b) If not settled in this manner the Commissioners of Conciliation of the Department of Labor shall be notified if they have not already intervened in the disputes,

(c) If not promptly settled by conciliation, the Secretary of Labor shall certify the dispute to the Board. After it takes jurisdiction the Board shall finally determine the dispute and

for this purpose shall use mediation, voluntary arbitration, or arbitration under rules established by the Boards. 9/

The N.W.L.B. consisted of a main Board comprised of twelve members, four public members, four representatives of management and four representatives of labour, and thirteen regional Boards together with several Industry Commissions. Its jurisdiction included virtually all American industry except rail and air carriers which were subject to the provisions of the Railway Labor Act. The first ten months of the Board's existence were spent settling disputes. Thereafter, it carried out a wage stabilization policy as well. 10/

3. The Parties' Role in the Decision Process

The process was primarily through the adduction of evidence and oral argument before the hearing panel and before the final Board. 11/ Once a dispute was certified to the Board the first step was selection of the tripartite panel from approved lists of management and labour representatives. Then a hearing was held and the hearing panel considered the matter in executive session and recommended a settlement. Following that, submissions and argument on the recommendations were heard by the National or Regional Board and a decision made. One participant in the process felt that this was unduly wasteful and has commented thusly:

...Another alternative that might have been resorted to was a requirement that the disputants submit only written briefs to the Board for final action thus dispensing with all oral testimony, public hearings, panels, hearing officers and reports. But the traditional American concepts of fair play, of disputants having their day in court, of abiding by some kind of due process in administrative law-making, all seemed to mitigate against this alternative. Final decisions under this simplified arrangement, furthermore, would not have been as sound, fair, or acceptable as under the longer procedure in which thorough-going analysis, debate and consideration were given to each disputed issue.

Although it was well recognized that Board public hearing rarely added anything new to the evidence already at hand, the psychological value was usually tremendous. The losing party tended to accept his loss with better grace because he felt that he had a fair hearing before impartial judges. In accepting the principle of flexibility and of due process in dispute case settlement therefore it appeared inevitable that a considerable amount of time would be required in case processing. Fairness to the parties involved, soundness of the judgment rendered and acceptance of the final award all demand it. 12/

4. Criteria of Decision

The National War Labor Board was given complete freedom to do its arbitral job as it saw fit. It decided to develop some guidelines on some matters. 13/

The clearest "principle" developed related to union security, the issue that caused the demise of the N.W.M.B. Through tripartite sessions it worked out in fairly definite terms a "maintenance of membership" provision. 14/ Other principles were not as clear cut and were not applied as regularly nor as consistently. The principle of equal pay created problems of work evaluation which the Board often ordered undertaken followed by further negotiation. Retroactivity was another instance of varied uncertain application. Wage dispute settlement principles proved to be most illusive and difficult to develop and apply. 15/ An attempt was made, however, as the Board realized that some of its decisions in leading cases would be treated as policy. Finally, in the Basic Steel Industry Case in 1942 the Board established the following formula:

...If a group of employees has received increases amounting to fifteen percent of their average straight time earnings over the level prevailing on January 1, 1941, the Board will not grant further increases except as a correction for maladjustments resulting from the rise in the cost of living. 16/

This principle of course related to "stabilization" and was not a "criterion" for a general wage rate adjustment, a fact which made its functioning much more adequate. Other standards for correcting substandard wages and fringe benefits were developed but their application as best was rough and hap-hazard. Professor Dunlop's opinion was that in some cases, particularly those involving correction of inter-plant inequities, the standards were totally unworkable. 17/ As to the separate treatment of all items in dispute he noted that this was a distortion of the manner in which they were dealt in the normal collective bargaining process in which package settlement was the practice and he felt that this distorted the bargaining process. 18/ His general opinion was that the attempt to establish and apply principles to wage stabilization was unsatisfactory, at times unworkable and that the difficult questions as to what was a substandard wage, what was a wage inequality and the like continually plagued the Board in administering its wage stabilization program. 19/

It is generally agreed, however, that the attempt to work out such standards was necessary and that it did speed up the work of the Board particularly as many of the disputes revolved around such items as union security and grievance procedures matters in which clear and workable guidelines and norms could be and were created. 20/

5. The Decision Process of the Board-Tripartitism 21/

The members of the Board and commentators are virtually unanimous that the tripartite character of the Board alone made the administrative scheme workable. 22/

In the hearings it was the function of the partisan panel members of assure that their party presented its case as effectively as possible and when they saw any opportunity for strengthening the case they would ask questions and elicit what information they sought. In the discussions in executive session, too, the partisan positions were followed. Basically the function of the partisan members was to obtain a decision as favourable as possible for their side and they sought to persuade those on the other side and the public members of the logic of their position. When their opposite number was uncompromising and there was little prospect of there being a unanimous award they would direct their argument to the public member in an effort to obtain a favourable majority vote. 23/

The partisan members really engaged in collective bargaining. Often they would not concede a position in executive session for fear of showing weakness but would do so in informal meetings with a public member. Persuasion tactics were their main negotiation tool although the threat of a rigorous dissent or even withdrawal 24/ (as had caused the demise of the N.W.M.B.) provided them with a form of bargaining power that was not neglected. The presence of the third public member added a variation to bargaining and when no agreement was in sight he used his coercive power of threatening to side with the opposite partisan members to obtain the concessions he felt necessary. One Board member has stated the process in these terms:

...What is not generally realized is that a certain type of collective bargaining played a large role in the decisions of the War Labor Board on issues in dispute cases which it had to settle. This was an outgrowth of the tripartite organization (labor, management, and the public) which characterized the Board and all its subordinate agencies and hearing panels. The Labor and Industry Members were representatives of their

respective groups. Many of them regarded themselves as something like attorneys for the respective parties in the cases which came to the Board for settlement. All of them conferre' with the parties and presented their arguments in executive sessions of the Board. It was a common occurrence in important cases that representatives of both parties to a dispute were in the Labor and Industry rooms and were consulted by the Labor and Industry Members while the Board was considering and deciding these cases. Not infrequently the Public Members asked the Labor and Industry Members to try out proposed settlements on the parties.

Procedures of this sort differed radically from those used by courts and also from the approved methods of arbitration. They were in fact a type of collective bargaining, very different from normal collective bargaining but operating in such a way that, even during war-time and with cases and issues on which the parties could not agree, they contributed to the final settlement. 25/

The essential difference between this process and "free collective bargaining" was that the outcome rested on the judgment of the public members with little regard for the relative economic power of the parties.

In addition, the partisan members were invaluable as experts who could sort out and explain the technicalities and implications of particular decisions. They also played important roles in negotiating and working out policy directives. But probably their most important contribution was that they assured acceptability of the Board's decisions and were highly effective in obtaining compliance with its awards. There was general agreement that the tripartite nature of the Board resulted in decisions that were more realistic, more practicable and more acceptable to the parties than otherwise would have been the case. 26/

The potential dangers of the partisan members having a conflict of interest in their dual role as representatives and government servants did not arise. Nor did the potential danger of their outvoting the public member. Rarely did an agreed upon solution between the two partisan members prove unsatisfactory to the public member such as to cause him to dissent.

The most serious problem was the delay involved in selecting the representatives, arranging their presence at the hearings and executive sessions, and coming to a decision. Nevertheless, there was general agreement that the time spent and delay incurred in the procedure were well compensated for in the realism and acceptability that the Board's decisions enjoyed.

In reporting to the Department of Labor on this aspect of the Board's experience McPherson concluded that it was definitely the most desirable form for decision. He pointed out that the participants shared this opinion in that when a choice was open between a hearing officer and a tripartite panel that they almost always chose the latter. Although he admits to its success, however, he adds a caveat by way of explanation. He stated that by the time the N.W.L.B. was in operation, labour-management relations had acquired considerable stability and he emphasized that there was universal recognition of the emergency created by the war and almost universal agreement by the participants and partisan members with the government's war effort. He also noted that the Board operated in a period of gradual inflation and was of the opinion that agreement and decision on wages was far easier in these conditions than would have been the case had depression conditions still been present. Nevertheless, all in all, he was of the opinion that it was the best possible alternative to collective bargaining as an "interest dispute" settlement process and that the most serious problem — delay — was well balanced by the acceptability and realism in the Board's decisions directly attributable to the partisan membership. 27/

6. The Impact of the War Labor Board on Collective Bargaining

Northrup in his recent book, "Compulsory Arbitration and Government

"Intervention in Labor Disputes" comments on page 23.

Finally, collective bargaining was profoundly affected by the War Labor Board. There was a strong tendency for representatives of unions and of management to refrain from bargaining and to dump all significant -- and many insignificant -- contract issues into the lap of the W.L.B. The ability to settle atrophied. When the war ended, the great rash of strikes in 1945 and 1946 was in part attributable to this reliance on the W.L.B. and the failure of the parties to appreciate that such reliance was no longer available as a crutch against their own failure to deal realistically with their own problems. 28/

Whether or not this is an accurate portrayal of the impact of the Board on collective bargaining, however, is open to some doubt.

From its inception on January 12, 1942 it handled only dispute cases. From October 3rd, 1942 to January 1, 1946 the N.W.L.B. handled both dispute and voluntary wage stabilization cases. Most of the cases it dealt with were of the latter category but during the five years of its existence it did hear 20,692 dispute cases. 29/ However, most of these involved only one or two issues. Nevertheless, taken alone it would seem to indicate a serious breakdown in bargaining. However, in actual fact it would appear to be less than 10% of all the negotiated collective agreements. 30/ For example, in the same period of time the Conciliation Service reported almost 60,000 completed settlements. 31/ Professor Chalmers directed himself to this issue in his report to the Department of Labor and made these observations:

...No available statistics permit even a close approximation of the number of negotiations that were concluded during the war and that might have gone to the Board if either party had caused a deadlock. If we assume that there were over 50,000 agreements in effect during the war, that most of these were in establishments and involved workers that were assumed to be covered by the no-strike agreement, and that these were negotiated each of the three and a half years from January 1942 through to August 1945, over 150,000 negotiations would be involved. If we also add

internal wage adjustments and wage reopening clauses within the term of the agreements and the grievances and other deadlocks, some of which are represented in the total Board cases, the total potential deadlocks that might have been certified to the Board is probably well over 250,000. 32/

Using Professor Chalmers' figures it would appear that only 8% of all interest disputes went to arbitration. By his estimates 92% were settled by direct negotiation. Furthermore, if one adopts yet another set of figures — the number of applications made for wage and salary adjustment — over 450,000, as representing the number of potential interest disputes, 33/ the settlement by arbitration percentage would be only 4%. And it must be remembered that in most cases that were submitted for arbitration, there were only a few issues unsettled and requiring decision.

On these statistics it would seem to be an overstatement to say that collective bargaining was profoundly affected and that the ability to settle atrophied. Perhaps, Professor Chalmers' portrayal in his report is the most objective:

...As indicated earlier, the labor-management conference has assumed that, although the Board would be given final authority to decide disputed issues, there would be a very large reliance on the process of collective bargaining during the war. This assumption conformed to both the Administration policy, as stated in the order creating the Board, and the Judgment of Congress, as expressed as late as 1943 in the discussion of the War Labor Disputes Act. In fact, there was a significant weakening of the bargaining method of reaching an agreement during the war. There was a considerable tendency for parties in negotiations to hold back their best offers so as not to prejudice the position before the Board. In addition, there was some tendency for employers to delay the conclusion of a dispute, depending on the no-strike, no-lockout agreement, and then the later decision of the Board. More significant there was, as public members of the Board noted, a tendency for both parties to pass to the Board the onus of making a decision which was less than they, and particularly their people, considered proper. But one of the most significant factors that operated to reduce the effectiveness of collective bargaining lay not in the Board's function of dispute settlement as such but of wage stabilization. Since the upper

limits of wage adjustment were set by the Board, and since unions tended to be under the necessity of reaching these limits, there was considerably less room for the parties in which to trade. Insofar as there was any uncertainty in the approvability of any specific wage change proposal, the parties ran the risk of losing that part of the bargain for which they had abandoned other contract demands.

Despite this tendency, the number of Board cases and decisions was only a small fraction of the total agreements reached during the war. Even in these cases, most of the issues were settled in negotiations. In part, this continued dependence on collective bargaining was an indication of the desire of both sides to make their own decisions. Perhaps of even greater importance was the fact that as the Board began to develop general principles, the parties were able to anticipate at least the general standards that the Board would apply to their case, if submitted, and to prefer the speed, realism, and self-decision involved in coming to an agreement themselves within those general standards. The Board consciously desired to encourage the maximum reliance on collective bargaining and used a number of devices to reduce the tendency of the parties to refer issues to the Board including the extension of existing agreements beyond their termination dates, with retroactivity while renewal negotiations continued, the Board delay in assuming jurisdiction if collective bargaining efforts had not been exhausted, the reference back to the parties of numerous issues, and the reference back to the parties for the application of a general principle.

As an important element in the appraisal of the effect of the Board's approach on collective bargaining, major emphasis needs to be given to the operation of the Board itself. In its tripartite deliberations, there was frequently transferred to its own rooms the process of collective bargaining ... Indeed, the most striking indication that the structure and attachment to the process of collective bargaining were preserved throughout the war period was the determination immediately after VJ-day to lift the governmental restraints on its operation. 34

7. Summary

The experience of the War Labor Board provides a number of useful insights but it must be remembered that it operated in unusual circumstances at a time when there was almost universal support for the war effort and a genuine willingness in all segments of American society to give a little for the Commonwealth. Nevertheless, it is useful as evidence of concrete

experience of one form of interest arbitration and as well, but to a lesser degree, in affording some indication as to its effect on pre-arbitral negotiations.

The Board did not purport to act adjudicatively. It was openly tripartite and its decision process was one of bargaining within the arbitral decision process with the public members having the ultimate power to settle the dispute. The hearing did not provide real participation in the process of decision. As mentioned the hearing really only served the psychological need of due process. Real participation in the decision of contentious issues took place through the reasoned argument directed to the application of established criteria of decision.

Indeed, on the question of "criteria", at least relating to wage matters, no truly satisfactory formula was ever developed. On other items, such as union security, criteria were established and on these issues the form of decision or process tended to be of an adjudicative nature. Nevertheless, the "polycentricity" of wage determinations and the package nature of collective agreements seem to be at the root of the major criticisms of the commentators dealing with the development of criteria by the Board. And it must be remembered that what guidelines were developed had the purpose and function of "stabilization".

The tripartite nature of the Board was clearly shown to be a form of bargaining and the descriptions of its operation by participants in the process has a striking resemblance to the process of the Industrial Arbitration Court now operating in Singapore and the final conclusion of the reports was that it had worked well.

We therefore conclude:

1. The voluntary approach depended, for its effectiveness, on the participation of labor and management representatives in the dispute-settling and wage stabilizing processes.
2. The partisan members added realism to the public boards and gave to the parties whose cases were being processed an assurance that their problems were adequately considered.
3. The possibility of withdrawal gave labor and management a genuine veto power, but one that could be used only at a considerable sacrifice.
4. The public members played a crucial role in the dispute-settling and wage-stabilizing machinery. They cast the deciding vote in practically all instances of policy formulation and in most case decisions. Their influence was adequate to protect the Government's interests.
5. The position of the public members exerted considerable influence upon the partisan members who took the lead in working out policies which met the needs of the war program.
6. The greatest benefit of tripartism was its contribution to compliance.
7. Other benefits of tripartitism included protection against appointments by political pressure and added assurance that case action on the part of the staff and public members would not be partial to either of the parties.
8. There were disadvantages in tripartitism. It moved slowly. On a few occasions, the public members were outvoted on wage-stabilization issues. Withdrawal crippled one of the boards (N.D.M.B.) and always remained as an uncertainty.
9. There were disadvantages, less danger of withdrawal from a tripartite board than of withdrawal from an advisory board or of loss of effectiveness on the part of an all-public board.
10. On balance, tripartitism worked well. 35/

As to the effect of arbitration on collective bargaining the experience is equivocal. Certainly it did not replace bargaining. Indeed, one is tempted to state that bargaining remained largely the basis of employer-employee regulation. But it did change the character of the coercive factors underlying negotiations. Nevertheless, it would appear that the tripartite

Board was able to "conflict" the parties in the majority of cases. There was a noted element of inefficiency involved, however, in that there was a tendency to save last positions for the Board stage and to this extent bargaining was weakened. And it is probably correct to say that the Board's stabilization function did have a considerable adverse effect on successful negotiations.

Some final comment should be addressed to the N.W.L.B.'s success in eliminating strikes. One of the primary objectives in the establishment of the N.W.L.B. was to assure uninterrupted production. But, as the following table indicates the Board did not meet this goal with total success:

WORK STOPPAGES OF CONCERN TO N.W.L.B.

JANUARY 1942-AUGUST 1945

Year	Stoppages	Workers Involved (000's)	Man Days Lost (000's)
1942	420	238	818
1943	1,439	1,288	11,302
1944	1,629	961	4,867
1945	869	837	6,563

Source: The Termination Report Vol. ii, pp. 822, 825, and 827. 36/

Although this would not appear to be a good record it must be remembered that the production days lost never rose above 0.17 per cent and there were strains on the system. It was a period of rapid growth in union organization and a period of enhanced bargaining power. Finally, and of substantial importance, is the fact that the Board operated at a time when management

in many plants had not accepted unions as either desirable or permanent participants in industrial relations decision-making.

AD HOC INTEREST ARBITRATION IN THE
UNITED STATES BETWEEN 1945 AND 1950

This portion of the study is based on Bernstein's "Arbitration of Wages", 37/ a study he undertook of reported interest arbitrations between the years 1945 to 1950. As a result, it yields no empirical data relating to the process of arbitral decision nor any indication as to the effect of arbitration on collective bargaining negotiations. Its main value is that the study relates to the use of "criteria of decision" that were declared to be determinative in the written reasons accompanying the decisions of the arbitrators. The approach Professor Bernstein adopted was to analyse the written reasons accompanying all the reported interest arbitrations during the six year period 1945-50. This was not supplemented by any empirical study of the actual operation of the arbitration machinery nor with interviews of the actual participants. 38/

His study covered 209 reported awards. 39/ In 195 of those the arbitrator set out or at least mentioned the "standards" or factors bearing on his decision and, in terms of separate criteria, there were 1,027 mentions made. 40/ These Bernstein has classified. 41/

1. Criteria of Decision

- (a) Comparability: By this Bernstein means a criteria based upon rates and terms existing in other situations either inter, industry, intra-industry, or inter-plant. Here the arbitrator determines what the comparable

rate is and uses it to determine what the terms of conditions of the dispute before him should be set at.

(b) Cost of Living: By this Bernstein means that the arbitrator selects an index which yields a percentage range of increase or decrease then applies it to the issues before him to determine the change that should be made.

(c) Financial Condition of the Employer: This criteria is often termed ability to pay or negatively an employers inability to pay increased benefits to his employees.

(d) Differential Features of the Work: This concept envisages payment for the skill and content of the job done. It really is another way of embracing work evaluation with the underlying notion that skill and content should be rewarded.

(e) Substandards: This notion envisages some standard of living that no employee should be beneath.

(f) Productivity: This envisages some sort of increase or decrease in employee benefits in relation to the increase or decrease in the productivity of the enterprise, be it country, industry or individual operation.

(g) Hours of Work: This is a factor that takes into consideration whether the work is seasonal, on off hours, regular or irregular.

(h) General Economic Conditions: This can mean a great number of things but generally it is supposed to reflect general conditions of the economy such as inflation, depression, balance of payments.

- (i) Union Behaviour: This criterion appears to be based on the notion that good behaviour merits more consideration than otherwise.
- (j) Manpower Attraction: This is only a phrase to indicate a criterion that in some way takes account of the manpower attraction power of a particular settlement.

Some interesting results appear from Bernstein's consideration of these criteria. In nearly 50% of the cases decided, the arbitrator expressly stated that "intra-industry comparisons" were the controlling factor in his final decision. The frequency of reference to this criteria in argument by employers was 29% and by the unions 26%. Only in 8% of the cases did the arbitrator state that inter-industry comparison was controlling although it was appealed to in argument by unions 20% of the time and by employers 10% of the time. The "cost of living" factor was stated to be controlling by arbitrators in 34% of the cases they decided but was only appealed to by unions in 25% of the time and by employers 7 $\frac{1}{2}$ % of the time. Other criteria such as the "financial condition of the employer", "substandards", "differential features of the work", were frequently appealed to by both the employer and union participants but were only held controlling by arbitrators in 4% of the cases they decided. Altogether, "comparability on an intra-industry" basis and "cost of living" comprised 83% of the cases determined. The other eight factors were only controlling in seven cases out of the 114 in which they were mentioned by the participants. 42/

Furthermore, the fact that there were over a thousand mentions of the various criteria in less than 200 cases indicates that there were constantly a multiplicity of criteria involved with no certainty as to which was governing. And the lack of co-incidence between arguments based on the two major

criteria, comparability and cost of living, suggests that the participants did not enjoy any reasonable or substantial share in the decision process. The most convincing evidence that none of the criteria was really workable, however, comes from Bernstein's analysis of the difficulties faced in their application to actual situations.

2. Difficulties in Application

(a) Comparability on an "intra-industry" basis 43/

It is not surprising that this "standard" is most commonly resorted to by arbitrators. To the worker it provides a measurement of the adequacy of his income. Union officials and employers similarly resort to it as a yardstick for measuring competitive wages and bargaining skill. And arbitrators find comparisons appealing in that they operate somewhat like precedent and are most apt to satisfy the normal expectations of the parties. They are generally readily transferable to cents per hour. But, and this is significant, they are totally unsuited for one situation — the wage leader — the first one.

There are several difficult problems, however, in the application of "comparability" criteria which are masked somewhat by its appealing simplicity. Industrial classifications are innately arbitrary. Among the more common problems are the overlapping of the boundaries of two industries, sub-industries, firms with diverse operations, new industries, auxiliary plants, and unique firms. And these unruly fact situations can range from those capable of being reasonably solved to the unanswerable. A second related difficulty in intra-industry comparisons is the geographical factor. There are considerable differences in many cases due to geographical

location. Determining the geographical limits of the "comparable base" can be as difficult and arbitrary as decisions relating to the definitions of the industry. Thirdly, differences can arise on the basis of ownership, whether the employer is private or public. Finally, determining whether the comparison should be limited to product markets adds another difficult variable because with the few exceptions, for example where there may be strong competition in an industry, nearly every individual business has a somewhat specialized clientele.

The "employer" problems are compounded when one adds the "employee" to the picture. Difficult "comparability" issues can arise involving job content, methods of wage payment, regularity of employment, extra-rate income and fringe benefits. Since the same job titles in different firms often apply to divergent duties the content of jobs hampers application of comparable rates. Job performance may differ for a number of reasons such as the type of equipment used, difference in the scale of production operations and different managerial techniques. The variety of methods of payment, hourly earnings, piecework, combinations of the two, incentives, fringes, and commissions are all additional complicating factors. Regularity of employment within different sectors of an industry too can provide a differing basis for payment methods and wage rates. Construction work and manufacturing in the same industry provide apt examples.

Thus, only in very homogeneous industries, situations that are most exceptional, can it be said that "comparability" provides a clear objective standard for decision. In most situations it tends to be slippery with a great multiplicity of factors to be considered and weighed in its application.

(b) Cost of living adjustments 44/

In cases in which the arbitrator accepts that the criterion to be used is one of making a wage variation to cover cost of living changes again a superficial simplicity gives way to a number of difficulties in actual application. The arbitrator must make at least four rather arbitrary decisions. First, he must choose one of several indexes. In one case 45/ cited by Bernstein, 46/ four possible indexes would have yielded widely varying results. Thus a base must be selected. It could be, for example, the date of the expiration of the old contract, the date of its initial operation or virtually any other time. In that case, if the 1935-39 wage rate had been chosen as the base, the cost of living factor would have reduced wages by 24c an hour. If the 1941 rate had been chosen it would have reduced wages by 10c. If V-J day had been selected as the base there would have been no increase, but if the effective date of the second to last contract had been chosen the increase would have been 21c. Finally, if the effective date of the last contract had been chosen the increase would have been 11c per hour. Which base should have been selected? No reasoned and obvious answer is possible. And this creates an opportunity for arbitrary and unpredictable choice, thus considerably reducing the usefulness of the criterion as an objective standard. It makes it into a "spurious rule".

Cost of living as a criterion is only useful on money items. It is of no value to the non-monetary terms and conditions and it suffers further from the fact that psychologically it has the appearance of only preserving the real value of the wages paid. It does not, at least in theory, provide any real increase.

(c) Other Criteria 47/

Ability to pay or inability to pay is almost meaningless. The employer's typical plea is negative, an inability to pay, and its purpose

is to negate comparisons that would imperil the marginal operation. Real problems exist, however, in determining inability to pay, and even if determined further, problems arise in translating it into a wage decision. Involved in this is determining a "reasonable profit". Is it to be determined on a basis of sales or in relation to investment and what is a fair division between consumers, shareholders, managerial remuneration, and the employees? "Differential features of the work" again are fraught with difficulties. Such factors as skill, content, hazard, onerousness of the work, regularity of employment and fringes are vital to wage administration within the firm but play almost no role in general wage changes. Productivity is probably the most illusory of the lot. The fact is that man-hour output has increased generally and it has permitted a long term rise in real wages but application of this fact to particular cases is haphazard to say the least. As in application of "ability to pay" there is no formula for allocating productivity gains between all claimants, consumers, workers and investors.

3. Bernstein's Views

The remainder of the criteria classified by Bernstein are open to criticism and the total lack of any workable criterion or standard for determining wages led him to a conclusion that some other approach must be looked to. He was of the opinion that no standard could be easily or fully applied (in our terminology, "could not be applied adjudicatively") and that the response of the arbitrators must be guided by practical considerations of acceptability. He said that compromise and negotiation were necessary for this reason and he postulated that this was the main reason for the wide use of tripartite tribunals in the cases studied. His opinion was that often very practical considerations were taken into account to bring cases to decision. For example, he cites the Pittsburgh Transport Case. 48/ In that case, the chairman of a tripartite board urged acceptance of the Chicago rate which to him seemed comparable. Neither Partisan

board member would go along, however, and to obtain a majority the arbitrator was compelled to side with the party closest to his suggested rate. 49/

Bernstein concludes that a tripartite board is by far the most suitable form of determining these "interest" disputes despite its obvious shortcomings in delay and inefficiency. He feels that because there are no workable criteria, the negotiated and compromised decisions of the tripartite panel are not only most suitable but also essential for acceptance by the parties.

Bernstein is of the opinion that there are no acceptable governing criteria and further that their mention in reasons accompanying decisions are often simply rationalizations. He agrees that the criteria mentioned are relevant to wage determination but that there is no way to give them concrete weight or objectivity. The arbitrator necessarily is making a decision with only slightly fettered discretion. 50/ He says that the criteria often yielded a range of decision wider than the parties' differences and the problem became one of making a judgment on balance that would be the least unacceptable to both.

The usefulness of Bernstein's analysis to this study is that it reconfirms the judgment that the "polycentricity" of both internal and external wage structures renders decision by the application of standards almost totally illusory. The failure of the parties and arbitrators to develop such standards and the marked preference for the non-adjudicative tripartite form of arbitral tribunal tend to corroborate this judgment. And the porous nature of the leading "criteria" well exemplifies the unsuitability of the problem to a form of reasoned decision-making.

SOME STATE EXPERIENCE 51/

The year 1946 set the record for man days lost by reason of strikes to that time. 52/ Among the industries affected were a number of public utilities including electric light, power and gas operations. As a result eleven states enacted emergency legislation in 1947. The laws of eight of the states provided for a form of compulsory arbitration (New Jersey, Indiana, Florida, Wisconsin, Pennsylvania, Michigan, Nebraska and Minnesota) and they were operative until 1951 when a Supreme Court decision invalidated them on the ground of federal pre-emption. 53/

Basically, the statutes applied to privately owned companies supplying power, gas, water, telephone and public transportation services. They all intended that the parties should primarily rely on collective bargaining but that in the event of a strike or threat of strike that the governor believed would be harmful to the public, he was required to appoint a conciliator. If after three days the conciliation was unsuccessful, the dispute was to be referred to a Board of Arbitration. Strikes and lockouts were prescribed once a conciliator was appointed.

Most of these laws were based upon the Indiana statute. 54/ It established a Board of Arbitration selected from a panel of neutrals by the Governor. Standards were laid down in that the Board was directed to establish "comparable" rates based on similar utilities in defined markets. If no comparable public utility operated in the defined area the Board was to make its comparison with adjoining market areas. The procedure was adjudicative in that the parties had the right to a hearing and presentation of evidence through witnesses followed by oral argument. In setting wages the Boards were to take into account fringe benefits and the stability of work afforded to public utility employees.

There is a paucity of material relating to the experience of these arbitration statutes and much of that which is available tends to be some very general observations. ^{55/} It does, however, direct itself to the effect of arbitration on collective bargaining, and to the working of the standards established by the legislation.

1. Criteria of Decision

Recently, Northrup and Rowan considered the workability of the standards in the Indiana type statutes. They came to the general conclusion that the standards while restricting the arbitrator's discretion somewhat, really did not afford accurate and workable objective criteria of decision. They concluded that in situations in which there were a multiplicity of standards the arbitrator could virtually choose the one he felt most accurately supported his position. They concluded that:

...Standards do not, however, insure uniformity of criteria. There is, first of all, the job of determining what a labor market is. Economists and practical industrial relations men alike are not in agreement on a definition of this term. In the Pittsburgh area, for example, there are several electric and gas utilities. One electric utility serves the heart of the city. Another serves the suburbs and the outlying areas, and in addition, serves counties some distance away. Wage rates in the center of Pittsburgh are likely to be higher than those in the less populated neighbouring areas. Where one labor market begins and the other ends is a difficult, complicated question upon which reasonable men could easily disagree, but a decision on this question could be decisive in wage dispute.

Then there is the question of how to evaluate fringe items and perquisites. Should people with steady employment have lower wages? In other words, what price security? Basically, there is a subjective matter for which no objective criteria have been developed. One could perhaps figure the dollar value of extra vacation and extra holidays, but how about the dollar value of a lenient policy as to absences versus a strict policy?

Perhaps the most difficult question would involve a comparison of pensions. For example, one company might provide a very liberal but non-funded plan which was rather loosely financed, while another company established a firm pension trust under the most careful financing procedures both with somewhat lower benefits. If the union in the second company demanded equal benefits to those in the first, how would standards help solve this.

The experience with standards in the "Indiana type" states indicates quite clearly that the arbitrators overlooked the restrictive standard and decided cases on broad comparisons with relevant companies in either areas or adjoining states. This administrative departure from the narrow confines of these laws illustrates the difficulties of writing standards into law. Standards restrict the discretion of arbitration; they do not destroy it. 56/

2. The Effect of Arbitration on Collective Bargaining

Opinion on this question varies considerably. Northrup and Rowan were of the opinion that the effect was considerable and that arbitration did compete with bargaining and did tend to reduce it to a formality preceding arbitration. This view was shared by MacDonald and Kennedy in their examination of the New Jersey experience but other commentators have not been quite so positive in their assessments.

In examining the New Jersey experience Kennedy concluded that arbitration had impaired bargaining. 57/ He concluded (a) that both sides were afraid to make their final positions known lest the other side would use it as a springboard for a better arbitral solution; (b) that negotiators were often reluctant to take responsibility for settlement when a better one might have been achieved through arbitration; (c) non-essential demands were harder to settle because the parties were always inclined to take a chance at arbitration; (d) the system developed the growth of professional arbitration advocates who argued the cases, thus tending to

take the settlement out of the hands of the people directly involved in negotiation; and (e) when the company was faced with rate increases that had to be approved by another public body it generally felt in a stronger position in obtaining a rate increase if a wage increase were ordered by arbitration rather than settled by direct negotiation. 58/

In their study of the New Jersey and Pennsylvania experience France and Lester were not nearly so categorical. 59/ They tended to be of the opinion that established bargaining relationships in existence before the laws were passed were generally unaffected by the introduction of arbitration. A Wisconsin arbitrator felt that the law did not discourage collective bargaining although his opinion was not shared by the union people involved. 60/

Northrup and Rowan were not prepared to say that the various arbitration statutes supplanted collective bargaining but they did say that the possibility of arbitration in some situations did have a deleterious effect. 61/ In a study of the Urban Transport Industry in several of the States they concluded that generally the parties withheld their true final position because of a fear that if no settlement were reached it would be used as a minimum figure by the arbitrator. 62/ As a result they found that the parties to negotiations in the industry generally concentrated on preparing for arbitration rather than seriously negotiating.

They found that the situation in Pennsylvania was not quite the same despite the fact that the legislation initiated arbitration automatically when the employees refused the employer's "final offer". They attribute the success of collective bargaining there to a conscious policy of the Arbitration Board to discourage arbitration and by openly making it difficult and time consuming to obtain an arbitration decision. 63/

In general, they were of the opinion that the alternative of arbitration allowed both companies and unions to avoid taking responsibility for unpopular decisions. They state that union leaders and management negotiators, if put in a position in which a settlement would put themselves in an unfavourable light with their constituents, would be strongly tempted to have a dispute go to arbitration. This always gives them an out in that they could criticize and blame the arbitrator for the unpopular result. In addition, they found that when the employer was controlled and was required to obtain sanction from rate regulatory tribunals that this tended to reduce their initiative in finding a settlement through collective bargaining. 64/

In addition, it was their opinion that removing the right to strike did seriously damage collective bargaining negotiations:

Granted that "free collective bargaining is the best solution we have been able to devise to the employer-employee relationship" does that mean that any interference with the right to strike means the end of collective bargaining? Assuredly not. But if the strike or lockout are removed from the scene, they cannot perform their essential function. For strikes and lockouts serve "as the motive power which induces a modification of extreme positions and then a meeting of the minds. The acceptability of certain terms of employment is determined in relation to the losses of a work stoppage that can be avoided by an agreement. In collective bargaining, economic power provides the arbitrament.

When the right to strike or to lockout is withdrawn, as through strike control or emergency legislation, the inducement to agree declines sharply. If the parties are not faced with the consequences of refusing to settle, their desire, determination, or even ability to settle dwindle. This has occurred under each and every law or procedure, federal and state, legal and extra-legal, which has been in existence. No strike control law or extralegal method has succeeded in avoiding this pitfall. And this is true of every other democratic country as it is of the United States. 65/

One last comment must be made with regard to Northrup and Rowan's opinions. That is exactly what they would appear to be. There are no sound empirical data or careful analyses and most of their judgments are cast in very broad generalizations. They are not necessarily invalid for that reason but they must be accepted with some regard or allowance made for that fact.

3. Summary

The American state experience is fragmentary and not thoroughly documented. Often the prejudices of the observers seem to colour their observations. It therefore provides a rather weak basis for any conclusions with the exception of their apparent unanimity as to the operation of standards. The standards developed by some statutes did not operate satisfactorily in practice and the commentators tended to the conclusion that none could be so developed.

As to the effect of arbitration on bargaining, it is quite clear that the existence of arbitration did have some effect and that it did weaken the traditional forces operating to coerce a settlement. Undoubtedly there were cases where rate regulation and a desire to avoid responsibility did tend to render pre-arbitral negotiation somewhat perfunctory but in the absence of more statistical and other evidence it is impossible to come to any firm conclusions as to its exact impact. Fleming in considering the question concluded:

...From all this, it would seem to be a fair conclusion that most observers believe compulsory arbitration has an adverse effect on collective bargaining. The critical question is how serious the effect is and also whether it is inevitable. Where the attitude of the parties toward the law is one of dissatisfaction from the outset, it is reasonable to suppose that the effect will be more serious. On the other hand, it is possible that experience would diminish, though not erase the impact of the law upon normal collective bargaining. 66/

THE ONTARIO HOSPITAL ARBITRATION EXPERIENCE 67

Professor Arthurs' recent study of the operation of the Ontario Hospital Labour Disputes Arbitration Act 68/ is the only really thorough analysis of Canadian "interest" arbitration. However, the relative newness of the statute makes any conclusions conditional only. The legislation was enacted in 1965 following a Royal Commission enquiry into the Trenton Memorial Hospital Dispute. The Commission recommended some form of arbitration whenever patient care was seriously affected by a strike or when the parties had failed to bargain in good faith. The legislation, however, was much more certain. It provided for arbitration in situations where there proved to be an impasse in collective bargaining upon the failure of conciliation. 69/

The form of the arbitral tribunal was to be tripartite with the public or neutral members being appointed on an ad hoc basis. The parties were to be allowed to participate in the process through a hearing with the union bearing the onus of proving that its claims were justified. No standards were established by the legislation as criteria for guiding both the parties and arbitrators and the decision process was not defined in any way.

1. Criteria and the Process of Decision

There is no examination into the nature of the decision process in Professor Arthurs' study except a conclusion that most arbitrators considered themselves to be engaged in a process of "adjudication". On some occasions, however, they guided negotiated settlements of issues at the time of the hearing. Presumably, the tripartite character of the Boards has resulted in it operating as a form of bargaining although this is not alluded to in the report.

The use of standards was resorted to, however, and the success of their use is of importance. The report states that a variety of factors was mentioned in the arbitral awards but no attempt was made to translate them into precise applications. The over-riding concern of the arbitrators appeared to be in arriving at a result that would have been reached through collective bargaining. Comparisons, adjustments for cost of living increases, peculiarities in the labour market under consideration and general wage movements seemed to be the main criteria alluded to by the arbitrators. There were 24 awards handed down to June, 1967 and of these 13 were unanimous. The dissents tended to be on the employer's side relating to the introduction of a union security clause and on the union's side expressing criticism of the Board's failure to keep in line with general industrial increases. Of all the criteria considered in the awards inter-hospital comparison appeared to be the most significant.

It should be noted that arbitrators were frequently influenced by the negotiating positions of the parties. In many cases the positions of the hospital and of the union in negotiations were treated as the maxima and minima of the settlement range. In two cases the awards were based on the settlements achieved in pre-arbitral negotiation but subsequently rejected in one case by the union membership and in the other by hospital officials.

Although Professor Arthurs' comments that such items as wages, vacations, fringes, welfare and hours were susceptible to relatively objective measurement and comparison it is not clear in light of the foregoing practice and the fact that the tribunal is of a tripartite kind that this sort of attempt to apply "criteria of decision" was substantially the basis of decision. He does mention, however, that such matters as union security

and work rules which arose in 50% of the cases were not susceptible to objective measurement. 70/

2. Impact on Collective Bargaining Negotiations

As the legislation was designed to make arbitration operative only after a breakdown in collective bargaining, the actual experience of the operation of arbitration in the Ontario Hospital situation provides some useful insights into the actual effect it has had on negotiation.

There have only been 55 situations in a period of approximately three years in which negotiations have not reached agreement either with or without conciliation. Of the 190 agreements in force as of July, 1967 in bargaining units covered by the Act, only 16 (8.4%) were the product of arbitration. 119 were arrived at without the intervention of a conciliation officer and one-third of the cases referred to arbitration because they were unsettled at the conciliation stage were finalized before the arbitration hearing had been concluded. However, a follow-up study carried out one year later showed that the percentage of arbitrated agreements had increased to somewhere between 13.3% and 19.1% depending on whether all of the scheduled arbitration cases were proceeded with. Nevertheless, as Professor Arthurs concludes, the statistics indicate that the advent of arbitration has not yet caused the abandonment of collective bargaining of one kind or another.

A questionnaire designed to reveal why bargaining was favoured as much as it appeared to be yielded the following results:

- (i) All three groups contacted — management representatives, union representatives and neutrals — felt that the introduction of

arbitration either did not change collective bargaining or made agreement more readily achieved. That is, that the arbitration system positively assisted negotiated settlements.

(ii) Management was generally of the opinion that arbitration favoured unions and the union people on the other hand felt that it was management who benefitted by going to arbitration. Each side felt that it could get a better or at least equally good settlement through negotiation than through arbitration. Each party operated on diametrically opposed premises but the beliefs of each made them tend to prefer a bargained agreement over one that is a product of arbitration.

(iii) Of the neutrals contacted, about half felt that awards were about the same as would have resulted in negotiated agreements and half believed that arbitration decisions were higher than would have been the case if it had been negotiated.

(iv) The explanation for the unions not seeking arbitration more frequently is suggested by their almost unanimous opposition to compulsory arbitration in principle. Only one union indicated a tolerance for arbitration in principle (although 67% of the unionists involved in this actual operation expressed satisfaction with the results they received). However, it should be noted that 50% of the unionists contacted favoured retention of the scheme with amendments and another 12% without alteration.

(v) In the period under examination, April 1965 through June 1967, only twice were the same parties involved in arbitration. The scheme presented ten possible occasions where the same parties could have

ended up in arbitration but in eight of these they did not. Rather, negotiated settlements were arrived at. Whether in these cases the parties found the possibility of arbitration distasteful and a real "cost of disagreement" or whether they were induced to settle because they could readily predict the likely result was not revealed by the study.

(vi) One Union — a union which favoured arbitration on principle — was involved in 12 of the 28 cases although in only one instance was it involved in a second arbitration with the same hospital, a fact which tends to indicate that the union concerned has not given up attempts at negotiated settlement.

(vii) At least in the small bargaining units, the unions indicated that the dollar cost of going to arbitration was a deterrent.

3. Summary

Any conclusions based on the experience under the Ontario Hospital Labour Disputes Arbitration Act must for a number of reasons be treated with caution, the predominant reason being that the Act has only been in force for a little over three years and it is too early to assess definite positions. The short period of experience may not accurately portray the future because of the general unfamiliarity with the working of the arbitration scheme. As it becomes more widely known it is possible that there will be less disinclination to resort to arbitration. On the other hand, the fact that only 20% have resorted to arbitration a second time would support the opposite point of view. Furthermore, this initial period has been one in which the working conditions and wages of hospital employees would likely have improved quite apart from bargaining or arbitration. Should there be a slackening of this trend, a change in the pattern of use or resort to arbitration could develop.

Despite these caveats, however, the experience under the act to July, 1968 would seem to indicate that it has not undermined bargained and negotiated settlements. Again, however, to what extent the character of the negotiation process has been intrinsically altered, if at all, is not known. Furthermore, as indicated by the questionnaire results, the effect of arbitration on bargaining would seem to be greatly affected by the parties' judgments about arbitration. Where both parties believe that they can do better by direct negotiation it is not surprising that their resort to arbitration is occasional. This belief is being replaced by the actual facts of experience as arbitral awards have been more favourable than many negotiated settlements and this somewhat explains the increased resort to arbitration between 1967 and 1968. Professor Arthurs suggests, however, that the unavailability of objective data and clearly defined decisional standards may make arbitration uncertain and therefore unattractive to the parties and operate as a counter-vailing force to arbitration.

A SELECTED SAMPLE OF COMMENT

By way of conclusion it is useful to collect and present some expression of opinion by both students and participants in labour relations relating to arbitration and collective bargaining as processes for the resolution of interest disputes. The following is not comprehensive but it represents a reasonable cross-section of current opinion and belief concerning these two processes.

1. Union Opinion

The most comprehensive expression of union opinion on the topic of compulsory arbitration is that of the Brotherhood of Railway Trainmen, "The Pros and Cons of Compulsory Arbitration" published in 1965. 1/

Their initial and main criticism of a process of arbitration is that it would give government an over-riding share of the determination of terms and conditions of employment which they believe to be incompatible with the basic democratic freedoms professed to be operative in the United States.

They comment:

With the final power of decision-making in the hands of a third party, the charge is made that decision-making is divorced from the responsibility of living up to that decision. In collective bargaining, contract provisions are agreed to by the parties who must "live with" them. However, in compulsory arbitration, the contract provisions are set down for labor and management by a third party and not bound by the decisions. The danger here is that the third party may establish conditions which are unacceptable to labor or management. T2/

Their comments with regard to the combination of bargaining and arbitration are more elaborate. After postulating the usual position that the strike could be proscribed and arbitration substituted as an alternative, the report continues:

Unfortunately this reasoning is incorrect. If compulsory arbitration were enacted in the United States as a necessary final step in contract formation, any prior collective bargaining would all but cease to exist. The reason for this lies in the understanding of why the two parties make concessions and compromises under the process of collective bargaining. Concessions and compromises are the result of the relative bargaining positions of labor and management. If labor can inflict a serious cost of disagreeing on management, management makes a concession or compromise, and vice versa. However, under a system in which compulsory arbitration has outlawed the strike or lockout, neither labor nor management can impose any costs of disagreeing upon each other. Therefore, no concessions or compromises will be made; no true collective bargaining will occur.

This would especially be true if one of the sides in the dispute were much weaker than the other. The weaker side would have no real ability to impose a cost of disagreement in the attempt to win concessions. Consequently, the party in such a position could stand to gain more by deadlocking negotiations in the hope of winning a more favourable award from the arbitrator.

A further reason why the parties to the contract dispute would not want to make any concessions or compromises lies in the basic nature of the arbitration following deadlocked negotiations. The arbitrator would have to make his decisions based upon the evidence presented by the parties. Since neither labor nor management wishes to be in a weak position when it presents its case to the arbitrator, neither side will make any concessions during collective bargaining negotiations. Rather each will cling to its original stand in order to improve its chances in the arbitration court.

Without concessions and compromises, collective bargaining cannot work. The very threat of the use of compulsory arbitration as a final step prevents the effective working of free collective bargaining. Experience during World War II indicates that when labor and management realized that arbitration was a final step in settlement, they refused to make concessions and did not come to agreements on issues which they probably could have solved themselves. Instead they submitted to the arbitration of the National War Labor Board. B/

Finally the report concludes that criteria of decision are inappropriate for arbitration of interest disputes. It states:

In the courtroom, judges are bound to render decisions in accord with relevant law and previous judicial decisions. However, the arbitrator is not so bound. In fact, arbitrators themselves have reached a consensus on only one fact: that they cannot make their awards based upon any particular set of criteria. Studies of arbitrated decisions reveal that no definite set of criteria can be established. For instance, a wage controversy involves consideration of facts varying from the cost of living to the living wage to comparisons with other forms. An arbitrator making his decision must decide what importance these various guides have and which particular criteria to use. Thus two arbitrators may examine the dispute from entirely different viewpoints and issue entirely different awards.

This uncertainty as to just how a particular problem will be considered and how an award will be made leads to certain difficulties. First the representatives of labor and management who must present their cases to the arbitrator will have no clear idea of what the arbitrator will base his decision

upon. As a result, the arbitrator's decision may favour that side which happens to hit upon those facts of evidence which impress him. Thus, the final decision may be influenced significantly by no more than cleverness in presentation. 74/

2. Management Opinion

It would appear that both management and labour have fairly consistently been in agreement in their views regarding compulsory arbitration. 75/ Both look upon it with some considerable disfavour. One representative put the management position this way:

Most members of management oppose government intervention and government controls in principle. Yet the emergency provisions are clearly a form of government intervention. This requires reasoning to distinguish this form from other forms. First, as indicated above, it is presumed to be intervention to prohibit unions from striking. Second, this intervention is supposed to give the parties a fair chance to negotiate their own settlement. Government assistance in conciliation and mediation is not objectionable in this view. But there is no widespread desire by management for such assistance as fact-finding, recommendations, or arbitration.

A large and articulate body of management people believe sincerely in collective bargaining. These people find themselves completely allied with spokesmen for organized labor in bitter opposition to compulsory arbitration. But they have not yet been joined by labor in opposition to government fact finding and recommendations as half steps toward compulsory arbitration.

These oppositions have some roots in fear, based on experience of government concessions to the demands of labor. But they have deeper roots in another fear. Management sees any such dictation by government as a threat to the principles of collective bargaining. Labor fought to establish those principles against the opposition of a previous generation of management. The new generation

in management has learned that collective bargaining, in principle, is democratic, is modern, and is constructive. 76/

3. Academic Comment

Some academics confirm these two positions but there is an indication that they are not prepared to accept that arbitration is of itself bad or that it will automatically result in a substantially lessening of collective bargaining negotiations. For example, Chamberlain and Kuhn say:

Unions and management strenuously oppose any compulsory arbitration in this country, seeing it as a threat to voluntary collective bargaining. Their opposition to it enhances its value as a possible means of settling disputes or stopping strikes. Even the possibility of its use should exert pressure upon the parties to reach an agreement on their own. If the government were empowered to intervene in true "emergency" disputes with compulsory arbitration, even though it seldom chose to exercise that power, the parties might be encouraged to submit their differences to voluntary arbitration. It thus would be an instrument of last resort, serving mainly as a prod to bestir the parties to approach voluntary dispute settlements more creatively than they had up to that time.

The main criticism of compulsory arbitration is that it undermines voluntary collective bargaining; it allows the parties to avoid the often unpleasant confrontation of their own difficulties, creating a dependency upon public authority. The criticism is valid if we judge the experience of a country such as Australia, where compulsory arbitration has long been used to handle all disputes. But if the government were to use compulsory arbitration infrequently, as only one of several means of handling large, disruptive strikes, the criticism loses much of its force. In fact, the frequent and regular use of arbitration does not appear to be a very good means of reducing strike losses. In Australia, strike losses are proportionally nearly as large as those in the United States, though our losses result primarily from strikes of several weeks duration, and theirs from short strikes lasting only a few days. 77/

In The Labor Sector, 78/ Chamberlain analyses his position much more carefully. He makes the point again that the threat of compulsory arbitration should be expected to have the effect of encouraging the parties to attempt to agree. He also points out that:

In general, the possibility of compulsory arbitration would be expected to act as a leveler of relative bargaining powers in the negotiations process. One might reasonably expect that the weaker party would welcome an arbitral determination more, since it would always hope that an outside settlement might be more influenced by rational argument and analysis than by power. If that is indeed the case, then the stronger party might be induced to make concessions to the weaker simply to forestall outside intervention. This would not be a wholly undesirable result. 79/

Following this, Chamberlain continues:

One interesting variation of the first type was tried briefly and without much success under the German Weimar Republic, but it continues to possess a certain appealing logic. Under this procedure the arbitration panel is limited to a choice of confirming either union position or the management position, but it may not adopt any compromise terms. The obvious intent is to drive the parties toward reasonable bargaining offers which will make voluntary settlement more likely, since with an unreasonable position an arbitration award — if it comes to that — is certain to go to the other party. In some circumstances this procedure could, of course, result in an unreasonable award which might discredit the system, but it is possible to imagine situations in which a rumoured intent to invoke this particular type of arbitration might be effective on an intransigent party.80/

He then states that if an element of uncertainty is wanted, this could be provided institutionally through having the arbitrator selected from a panel of experts — a jury — or a large panel with a random selection procedure. He then comments on the usefulness of the "arsenal" feature of the Federal Emergency Disputes Procedure in the United States. The decision of which weapons to use would always be in doubt and Chamberlain sees this as satisfying to some degree the desire for uncertainty. He points out,

however, that "it would fail to meet the second condition which we said any strike-control procedure should meet — that is, to permit each of the parties to inflict as well as bear, a cost of disagreeing on the other's terms". 81/

Chamberlain believes that because compulsory arbitration involves a party making the demands with virtually no cost of disagreeing that it creates a situation conducive to unsettled disputes. He thinks that what is needed is a procedure which imposes costs on both parties when it is invoked, so that both face a cost of disagreeing with the other. To this end, he then mentions the "statutory strike" or "semi-strike". This involves a mathematical computation that draws money from both parties at the instance of one. But as he points out the major difficulty that it would result in too complex a formula to be accepted as a fair one. Another alternative suggested by Chamberlain is that the cost of arbitration could be made prohibitive. This seems to have the most appeal to Professor Chamberlain and he says in this regard:

In this kind of a procedure, the workers would stay on the job and receive full pay for their work, and the company would continue to produce and receive full return for what it sold. There would be no subtle formulas — everyone could understand a price of so many thousand dollars per day for the services of the government agency. Thus this approach would accomplish what the statutory strike attempts, and much more simply and acceptably. At the same time it would meet the two requirements of an effective strike-control procedure: it would create uncertainty as to the outcome, and it would leave each of the parties with bargaining power which it could bring to bear on the other, so that the basic collective-bargaining process would not be undermined by resorting to this "emergency device". 82/

Chamberlain in conclusion, however, had this to say:

...Collective bargaining is an important ingredient of our democratic system, and collective bargaining requires the play of relative bargaining power between the parties, and as collective

bargaining is practiced today the strike as an alternative to agreement is still an essential element of bargaining power. Conceivably we may find some alternative means by which each party may impose on the other a cost of disagreement, but as yet we have no satisfactory general substitute for the strike. Even the special procedures discussed above could scarcely supersede the strike in all union-management relationships. 83/

And that:

...If strike controls are instituted, they must meet two conditions if they are to be effective and at the same time not undermine the bargaining process: they must create an element of uncertainty as to the outcome, and they must leave the parties in a position to impose on each other, and hence also themselves to bear, a cost of disagreeing on the terms sought and offered. In effect, this means that the strike controls must serve the same function as the strike in the bargaining process. 84/

4. Summary

Recently, Professor Phelps added his views to the controversy over the arbitration of interests disputes 85/ and they reflect the positions of the commentators. In effect, his position is that there has never been any reliable testing of the workability of a system of arbitration in North America and that there are hypotheses about its efficacy going both ways. He suggests that it may be necessary to experiment and his views carry an optimistic tone to the effect that something could be made workable. He concludes in this manner:

The essential argument here is that the judicial process has not yet been proved inappropriate to labor management disputes. If the point is reached where certain classes of individual cases of work stoppage are judged to carry too high a social cost to be tolerated, experimentation with some type of compulsory arbitration is a logical extension of past experience. The employer-employee relationship is a dispute breeding relationship. The best method of adjustment is bargaining between union and management. If that does not work, two alternatives are left; fiat or argument. Settlement by decree raises far more difficult questions than resolution by due process. If the method to be used is argument, then compulsory arbitration appears to be the best answer

yet devised. It is at least worth examining, in light of the evidence of past experience and without prejudgment based on sweeping generalizations or haphazard analogies. 86/

The foregoing analysis, both theoretical and empirical, would not support Phelps position that the "judicial process" has not yet been proved unworkable if Phelps means by that "decision by adjudication". He is more in line with the other experience, however, in his position that there has not been any definitive third party decision process experienced in the area of interest dispute settlement. Nevertheless, there would appear to be sufficient data to provide guidance as to what might be expected from the various forms that an arbitration system could take. It is to this end that the following concluding Chapter is directed.

REFERENCES

- 1/ See, Brissenden, "The Settlement of Labor Disputes Over Interests in the United States", 6 Journal of Industrial Relations, p. 20 (1964).
- 2/ Task Force Report No. 31 entitled, "Essential Industry Dispute".
- 3/ Cunningham, Compulsory Arbitration and Collective Bargaining: The New Brunswick Experience, Montreal, McGill University: 1958.
- 4/ The following is based in large part upon Bulletin 1009 of the United States Department of Labor entitled, Problems and Policies of Dispute Settlement and Wage Stabilization During World War II.
- 5/ See generally, Chalmers, "Volontarism and Compulsion in Dispute Settlement", in Problems and Policies of Dispute Settlement and Wage Stabilization During World War II, ibid. at pp. 26-71.
- 6/ Chalmers, Derber and McPherson, "Summary and Conclusions" in Problems and Policies of Dispute Settlement and Wage Stabilization During World War II, ibid. pp. 3-4.
- 7/ Executive Order 8716, March 19, 1941.
- 8/ The Captive Mines Case, Reports of the N.D.M.B., pp. 108-3⁴, 268-275.
- 9/ Executive Order 9017, January 12, 1942. The order is given in full in Termination Report Vol. II, pp. 49-50.
- 10/ Generally, see Chalmers, supra, n. 5, pp. 46-55.
- 11/ See McPherson, "Tripartitism" in Problems and Policies of Dispute Settlement and Wage Stabilization During World War II, supra, n. 1, p. 228 at p. 336.
- 12/ McNatt, "Problems of Case Processing" in Problems and Policies of Dispute Settlement and Wage Stabilization During World War II, supra, n. 1, p. 322 at 335-6.
- 13/ Generally, see Derber, "The Principles of Dispute Settlement" in Problems and Policies of Dispute Settlement and Wage Stabilization During World War II, supra, n. 1. at pp. 72-103.
- 14/ Ibid. pp. 81-84.
- 15/ Ibid. pp. 84-85.
- 16/ Douty, "The Development of Wage-Price Policies" in Problems and Policies of Dispute Settlement and Wage Stabilization During World War II, supra, n. 1, p. 10⁴ at pp. 130-131.
- 17/ Dunlop, "An Appraisal of Wage Stabilization Policies" in Problems and Policies of Disputes Settlement and Wage Stabilization During World War II, supra, n. 1. p. 155 at 164.

- 18/ Ibid. pp. 166-7.
- 19/ Ibid.
- 20/ See, Chalmers, Derber and McPherson, supra, n. 6 at pp. 8-9.
- 21/ The following is based largely on McPherson, supra, n. 11.
- 22/ In their summation, Chalmers, Derber and McPherson, supra, n. 6, state at p. 24:
- The support of the partisan members was essential to the success of the enforcement program. It is unfortunate that the partisan members of the National Board were unwilling to support the program without requiring tripartite participation in the initial decision of individual cases.
- 23/ McPherson, supra, n. 11. pp. 236-248.
- 24/ Ibid. p. 266.
- 25/ Witte, "Wartime Handling of Labor Disputes", Harvard Bus. Rev., p. 169 at 178. (1947)
- 26/ Supra, n. 6 , p. 25.
- 27/ McPherson, supra, n. 11, p. 266.
- 28/ Northrup, Compulsory Arbitration and Government Intervention In Labor, Disputes, Washington, Labor Policy Association: 1966.
- 29/ For a detailed statistical analysis, see U.S. Department of Labor, The Termination Report of the National War Labor Board (1948), Vol. I, pp. 479-502.
- 30/ Chalmers, supra, n. 5, p. 53 where he estimates that there were 250,000 agreements negotiated during the life of the N.W.L.B.
- 31/ Witte, supra, n. 25 at p. 177.
- 32/ Chalmers, supra, n. 5, p. 53 f. n. 36.
- 33/ Supra, n. 29.
- 34/ Chalmers, supra, n. 5. p. 61.
- 35/ Chalmers, Derber, and McPherson, supra, n. 6, p. 8.
- 36/ Reproduced by Chalmers, supra, n. 5, p. 52.
- 37/ Bernstein, Arbitration of Wages, Berkeley: University of California Press: 1954.

38/ Ibid. p. IX where Bernstein states:

Of necessity, sole reliance has been placed upon the award as written; it is simply not workable to look behind the printed page. In light of that fact, no one experience in collective bargaining and arbitration can be fully satisfied, for he must recognize that what remains unsaid may be decisive. Efforts made to probe the vital and elusive area of motive are based on sources other than the published awards.

39/ Ibid. p. 15.

40/ Ibid. p. 26.

41/ Ibid. p. 27.

42/ Ibid. p. 28, 29, from Table 10 entitled, "Incidence of Criteria Cited in Wage Arbitration, 1945-50".

43/ Ibid. pp. 56-67.

44/ See generally, ibid. pp. 72-77.

45/ San Diego Electric Railway Co. and Amalgamated Street Railway Employees,
II L.A. 460 (1948)

46/ Supra, n. 37, p. 75.

47/ The remaining criteria dealt with by Bernstein, financial condition of the employer, differential features of the work, substandards of living, productivity, hours of work factor, union behavior and manpower attraction, see ibid., pp. 77-106, are relatively insignificant and therefore have only received summary treatment.

48/ Pittsburgh Railways Co. and Amalgamated Street Railways Employees,
17 L.A. 155 (1951)

49/ Supra, n. 37, p. 67-8.

50/ Ibid. at p. 50 he states:

The final generalization is that the criteria of wage determination are something less than definitive. Their shortcomings are as hazardous to the arbitrator as they are to the parties. His problem is not to lay out a yardstick and measure off an amount, but, rather, to balance contesting standards in an exercise of responsible judgment.

51/ The following is based in large part upon studies by Herbert R. Northrup and Richard L. Rowan recently incorporated into a book by Northrup, Compulsory Arbitration and Government Intervention in Labor Disputes, Washington, Labor Policy Association Inc.: 1966.

- 52/ Northrup and Rowan, "Arbitration and Collective Bargaining: An Analysis of State Experience" in Northrup, supra, n. 50 at p. 216.
- 53/ Amalgamated Association v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951)
- 54/ For a brief description see, Northrup, supra, n. 50 at pp. 24-26.
- 55/ For a careful history of the Kansas law, see D. Gagliardo, The Kansas Industrial Court, University of Kansas Publications, Lawrence Kansas, 1941. A good study of the operation of the New Jersey and Pennsylvania law is France and Lester, Compulsory Arbitration of Utility Disputes in New Jersey and Pennsylvania, Princeton, Princeton University: 1951.
- 56/ Northrup and Rowan, supra, n. 51, pp. 229-30.
- 57/ Thomas Kennedy, "The Handling of Emergency Disputes" in Proceedings of Second Annual Meeting, Madison: Industrial Relations Research Association, 1949, p. 21.
- 58/ Kennedy, supra, n. 57, pp. 21-23.
- 59/ Robert R. France and Richard Lester, Compulsory Arbitration of Utility Disputes in New Jersey and Pennsylvania, Princeton: Princeton University, 1951, p. 87.
- 60/ Fleming, "The Search For A Formula" in Bernstein, Enarson, Fleming (eds.), Emergency Disputes And National Policy, New York: Harper, 1955, p. 213.
- 61/ Supra, n. 51, p. 225.
- 62/ Northrup, supra, n. 50 at p. 29.
- 63/ Ibid. p. 30.
- 64/ Ibid. p. 31.
- 65/ Ibid. p. 182-3.
- 66/ Supra, n. 60, p. 213.
- 67/ The following is based on Chapter 2 of the Task Force Report No. 31 by Professor H.W. Arthurs entitled, "Essential Industry Disputes".
- 68/ S.O. 1965, ch. 48.
- 69/ Ibid. s. 4.
- 70/ As the final report is not available no attempt to note the exact page reference has been made.
- 71/ The Pros and Cons of Compulsory Arbitration, Brotherhood of Railway Trainmen, Cleveland: 1965.

- 72/ Ibid. p. 46.
- 73/ Ibid. pp. 46-7.
- 74/ Ibid. p. 47-8.
- 75/ For a wide sampling of opinion see, ibid., pp. 105-179.
- 76/ Heron, "Industry Looks at the Emergency Provisions" in Bernstein, Enarson and Fleming, (eds.), Emergency Disputes and National Policy, New York, Harper: 1955 at pp. 127-128.
- 77/ Chamberlain and Kuhn, Collective Bargaining, New York, McGraw-Hill: 1965, pp. 418-19.
- 78/ Chamberlain, The Labor Sector, New York, McGraw-Hill: 1965.
- 79/ Ibid. at p. 640.
- 80/ Ibid. at p. 640-41.
- 81/ Ibid. at p. 641.
- 82/ Ibid. at p. 643.
- 83/ Ibid. at pp. 643-44.
- 84/ Ibid. at p. 644.
- 85/ Phelps, "Compulsory Arbitration: Some Perspectives", Industrial and Labor Relations Review, Vol. XVIII (October, 1964), p. 81.
- 86/ Ibid. p. 91.

CHAPTER V

INTEREST ARBITRATION FOR CANADA

CAN "INTEREST ARBITRATION" BE INTEGRATED INTO THE CANADIAN INDUSTRIAL RELATIONS SYSTEM?

1. Industrial Relations in Canada

As mentioned, Dunlop 1/ postulates that every industrial relation system is comprised of certain actors, certain contexts, an ideology which binds it together, and a body of rules created to govern the actors. And he further postulates that the major characteristics of a national industrial relations system are generally established at an early stage in the development of a country and that the economic, political and industrial "revolutions" in a country relative to the rise of the labour movement are fundamental factors to be considered. 2/ The obvious fact of the Canadian industrial relations system is that it has been profoundly influenced by the developments in industrial relations in the United States. Nevertheless, some of the more significant characteristics of the Canadian system should be briefly adverted to in a general way. 3/

(a) The General Setting

Generally speaking, the Canadian "economic culture" has close similarities to the American economic system. As Jamieson has pointed out: 4/

English-speaking Canadians share much the same system of values and goals as Americans, and they sanction the use of much means for achieving them. The values of the businessman tend to predominate in both societies. There is much the same emphasis on "achievement" and "success" (particularly in their material aspects) as the main criteria of personal worth and social status, and the same tendency to identify bigness and accumulation with progress (though Canadians are usually deemed less "aggressive" and "enterprising" than Americans in this regard). Both people are imbued with a strongly "practical" bent, as expressed in a suspicion of abstract theory and analysis, and a tendency to prefer the immediate and concrete to the intangible and the aesthetic. 5/

...

...Again Canadians in principle uphold equally with Americans the traditional values of freedom, equality, and democracy, though the former, due perhaps to the greater persistence of British traditions, are less imbued with the Horatio Alger myth and accept with less protest the facts of economic inequality and social stratification. 6/

This comparability runs through the whole fabric of Canadian society. "American-inspired fads and fashions, techniques of production and modes of consumption, standards of living, economic, social and religious ideologies, and philosophies of life generally, have become increasingly popular in Canada." 7/ Perhaps, a difference between the two nations lies in the fact that Canadians have been slightly less unwilling to accept government direction and intervention in the social and economic affairs in Canada but this is not of great significance to Canadian industrial relations. The structure and attitudes of management do not differ significantly. 8/ Canadian trade unions are closely related to their American counterparts and collective bargaining has a firmly entrenched tradition as the main process for establishing the rules for the work place. 9/

(b) Union-Management Relations

Although a decade or so ago Canadian management may have been more

conservative and less willing to accept trade unions than its American counterpart, this distinction has faded sharply. The international character of the corporate form and the singular nature of business education has resulted in a truly North American management elite. And it would not be unfair to generalize that management in Canada now is committed as strongly to the same values including self-determination in industrial relations and a basic commitment to collective bargaining as the means of their regulation.

Similarly, it would be almost impossible to distinguish between the Canadians and Americans present at a convention of the United Automobile Workers or the United Steelworkers of America. "By far the majority of all unionized workers in Canada belong to organizations that are branches of the so-called "international" unions, the membership, headquarters and executive personnel of which are overwhelmingly American. Union organizational structure, governmental systems, policies, and objectives in Canada, therefore, tend to reflect to a considerable degree those of American parent bodies in their respective industry or trade jurisdictions." 10/ This includes their basic belief in collective bargaining supported by the ability to strike as the only acceptable form (not only on the basis of the suitability of the process but also philosophically) for regulating their relations with management. Bargaining and the ability to use economic force is cast in terms of "democracy" and as a "basic freedom" of the individual. Indeed, in Canada as in the United States collective bargaining has become institutionalized by legislation as the main process of decision in labour-management relations. 11/

(c) Canadian Legislation and Government Policy

Canada is a federal system consisting of ten provinces and the division

of power between the federal and provincial governments flows from Secs. 91 and 92 of the British North America Act. 12/ Generally, industrial relations is within the provincial sphere of authority but a small portion falls within the federal authority. 13/ Although this severely limits the influence of the federal government's policy on Canadian industrial relations, the history of governmental policy and legislation, both federal and provincial, reflects a high degree of homogeneity. 14/

The Canadian legislative structure follows the form of the Wagner Act in the United States. The various provincial statutes and the federal Industrial Relations and Disputes Investigation Act include the main principles of the American legislation and utilize much the same type of machinery for enforcement. 15/ The legislation guarantees labour's right to organize; provides for the selection of units appropriate for collective bargaining; establishes a process for the certification of bargaining agents, directs employers and duly certified bargaining agents to bargain and each statute established a labour relations board to investigate and correct unfair labour practices. 16/ Of considerable significance, however, is the substantial effort by governments in Canada to curtail strike action and compel various forms of conciliation and arbitration. 17/

2. Compulsion in Canadian Industrial Relations

It has been said that the Canadian attempts to prevent strikes and lockouts by legislative means is in part due to the vulnerability of a national economy that has always been dependent on foreign trade significantly specializing in the large-scale production and export of raw materials and semi-finished goods. And, it is said that this has encouraged and resulted in the encouragement of a policy of avoidance of disintegrating

conflict. 18/ In any event, it is clear that the Canadian industrial relations system has always contained a significantly higher compulsory dispute settlement content than has its American counterpart. This has taken the form of requiring arbitration of "rights" disputes, prohibition of "recognition" strikes and requiring "conciliation" prior to exercising the power of a strike or lockout.

The first element of compulsion was introduced in the Railway Labour Disputes Act of 1903. 19/ It set up a tripartite board and empowered it to "compel testimony under oath, and the production of documents essential to the knowledge of the true situation". The act was intended to provide "conciliation" but if both parties agreed it could arbitrate. The right to strike or lockout, however, was not restrained. These features were entrenched in the Industrial Disputes Investigation Act of 1907 with an added feature. A new and important principle was introduced. The compulsory delay of work stoppages — a "cooling off" period — was incorporated into the legislation. By its terms a strike or lockout was prohibited while investigation and conciliation were underway. In addition, the Board was required to make reports of the conduct of the parties and to state what in the Board's opinion ought or ought not be done by the parties.

The second element of compulsion, already referred to above, compulsory bargaining, 20/ a key feature of the Wagner Act in the United States, was introduced that legislation be passed by Order in Council P.C. 1003 in 1943. In addition, it retained, in amended form, the procedures derived from the Industrial Disputes Investigation Act: compulsory conciliation of disputes and compulsory delay of strikes and lockouts. It provided for intervention by a conciliation officer at the first stage of a dispute, and failing settlement, the establishment of a tripartite conciliation board.

The third element of compulsion, compulsory arbitration of rights disputes, was also introduced by P.C. 1003. It required the incorporation into an agreement of a provision for settling disputes during the time the agreement was in force. This compulsion was met by the institution of grievance and arbitration clauses which provided for the final and binding settlement of disputes (almost invariably by arbitration) during the term of the agreement. And, correlatively the ability to strike or lockout was proscribed.

The provisions of P.C. 1003 have been more or less incorporated into the present eleven labour relations statutes. In 1948 the federal government passed the Industrial Relations and Disputes Investigation Act, and it retained most of the principles and procedures of P.C. 1003. Subsequently, the provinces passed labour relations acts modelled on P.C. 1003.

The compulsory arbitration of "interest" disputes has not enjoyed a central position in Canadian labour legislation since the end of World War I. Compulsion first became a reality in this regard in 1907 with the passage of the Industrial Disputes Investigation Act but it related only to mining, transportation, communication, and public service utilities although the parties to disputes outside of these areas could agree voluntarily to avail themselves of the arbitral services of the Act. In 1918, full compulsion was introduced and strikes and lockouts were prohibited, but this was abandoned shortly thereafter. The World War II emergency legislation did not go that far: it merely restricted strike activity. 21/

At present there are a number of specialized statutes providing for compulsory arbitration in a variety of forms and their incidence appears to be on the increase. In most jurisdictions, policemen and firemen, and

in some provinces municipal employees and school teachers are subject to some form of interest arbitration. Professor Carrothers provides a concise summary of the existing legislation as follows:

Three provinces, Manitoba, Alberta and Quebec, have standing machinery designed to meet emergencies. Manitoba since 1958 prohibits employees of crown corporations from striking if the works are declared "essential to the health and well-being of the people of the province". Alberta in 1960 gave the Lieutenant-Governor-in-Council power to declare an emergency and to set a date after which work stoppage is illegal. In section 99 of the Quebec Labour Code of 1964 is a requirement that eight days' notice be given of intention to strike in those public services where strikes are not prohibited absolutely. In addition, the Lieutenant-Governor-in-Council may appoint a fact finding board to inquire into a work stoppage, real or threatened, that in his opinion endangers the public health or safety. The inquiry may be supported by an eighty day injunction against striking. The whole policy appears to be modelled on provisions in the Taft-Hartley Act of 1947. In addition to the foregoing legislation, in 1962 strikes in hydro-electric services in Ontario were prohibited, and in 1965 strikes and lockouts in Ontario hospitals were banned. In 1963 Newfoundland amended the Labour Relations Act to empower the Lieutenant-Governor-in-Council to proclaim an emergency respecting a hospital dispute and to impose compulsory arbitration on the parties. In Quebec strikes and lockouts in public service industries and municipal and school corporations have been prohibited since 1944, and compulsory arbitration imposed in their place. 22/

Recently, the federal government passed legislation providing for collective bargaining by civil servants and other federal employees. A unique feature of the legislation is that it requires the unions to select initially arbitration or unrestricted bargaining, and to date about three-quarters of the unions certified have opted for arbitration.

The final form of compulsory arbitration operative in the Canadian system is one established by statute on an ad hoc basis but it has been a fairly recent innovation and has not received much use. 23/ The federal government has passed emergency legislation seven times but it has not always provided for arbitration and in only three cases did arbitration actually take place. 24/

Thus, the Canadian industrial relations system has been characterized by a considerable degree of compulsion not present in the American system. Although they share common legislative schemes which provide for compulsory recognition and compulsory collective bargaining, the Canadian legislation alone contains provisions for compulsory conciliation and compulsory arbitration of disputes over rights. 25/ In both, however, arbitration of interest disputes has never been a significant method for resolving disputes over the make-up of the code of rules to govern the worker-management relationship. 26/

3. Conclusion

Does this mean that "interest arbitration" would be more readily acceptable in the Canadian industrial relations system? Acceptable at all in any substantial way?

Compulsory arbitration of rights disputes, 27/ compulsory recognition and bargaining, and compulsory resolution of jurisdictional disputes are acceptable in large part because the issues involved are readily suited to adjudication. In those situations the parties affected are not deprived of their participation in the decision-making process notwithstanding the element of compulsion involved. To use the words of another student of the processes:

Disputes which arise during the period when an agreement is in force reveal clearly a distinct difference in character from those deriving from the negotiation of a new agreement. In the former case rights have been established and are defined in the agreement. A union contract, so-called, while much more than a recitation of specific rights and obligations, does establish those rights and responsibilities. The actions of management, which without an agreement can only be protested in terms of vague ideas about equity and fairness, are now subject to searching scrutiny in the grievance procedure in the light of the actual

responsibilities undertaken in the agreement. The parties themselves have established a body of rules and regulations for the administration of personnel. This becomes the "law" and provides the standards for judging cases. The third party who may become involved, the arbitrator, has clear directions from the parties themselves in the agreement they have enacted. It may be badly drafted or obscure, but in principle the clauses which have been negotiated provide him with a frame of reference. The political and ethical questions of equity have been largely removed by the agreement itself.

The problem of jurisdictional and recognition disputes have likewise been solved. But in those cases it is public, not private, policy that has provided the solution. The standards for determining the collective bargaining agency have been embodied in public law. They reflect the general recognition of the right to associate and acceptance of the notion of collective bargaining. The important point is that standards have been established by law; and the administrative machinery to carry out the intention has been set in operation. The members of labour relations boards have, in the law, been given fairly specific definition of the rights that the law confers. As in all administrative law there is still much room for discretion; nevertheless the basic issues are settled in the legislation and the gradual accumulation of administrative precedent tends to round it out. 28/

Thus, the general and unequivocal acceptance of these compulsory third party decision processes would seem due to the fact that the issues for decision are adequately justiciable and through the presentation of proofs and reasoned arguments, the affected parties do have a meaningful form of participation in the process of decision.

Compulsory conciliation and the "cooling off" period are not decision-making processes. They are partial restraints on the freedom to strike and lockout but the conciliation officers and boards of conciliation are not empowered to impose any settlements or terms on the disputants. Even so, however, this compulsory process has not enjoyed the same degree of acceptability as have the three aforementioned decision processes. 29/

The dissatisfaction with the conciliation process is not so much that it is compulsory than with its structure and operation and with the consequential delay. Neither the conciliation officer nor the subsequent tripartite board is solely concerned with mediation and conciliation. The conciliation officer in addition in some jurisdictions is under a duty to make recommendations respecting matters upon which the parties cannot agree and to make a recommendation as to the advisability of appointing a Conciliation Board. The Board's situation is even more complex and contradictory. Although it is tripartite the whole Board must take an oath of fidelity, truthfulness and impartiality. The Board is charged first with a conciliatory function and as well, with reporting its findings in a formal report. The resulting confusion is aptly described by Professor Carrothers:

The first charge is purely pragmatic. The Board is successful if it can report agreement, whatever the terms. Its problems flow from the fact that it may not attain the pinnacle of pragmatic success. At this point it is committed to any one of three classes of failure, graded according to their likelihood of assisting the parties toward a settlement without stoppage of work. A unanimous report is a first-class failure. A majority report is a second-class failure. A three way division is a third-class failure. A fourth alternative is such a notorious failure that it may succeed by relocating the locus of responsibility: to report to the Minister the fact that the disagreement has reached a deadlock without the responsibility of recommending terms. 30/

The resulting delay in particular has been subject to strong criticism. As two Canadian trade union congresses reported to a special Royal Commission:

The "cooling off" period often turns out to be a "hotting up" period, and the longer it lasts the hotter the dispute gets, and the greater the likelihood of a strike by workers who have lost all patience with "the law's delay".

...Nothing is so corrosive of good relations, or potentially good relations, as delay and procrastination. And, we might add, no part of the existing labour relations legislation is so heavily weighted against the trade unions as the built-in delays. 31/

The most vigorous criticism, however, is directed to that part of the process that requires the board to make recommendations. And here the attack is three pronged. In the first place that requirement diverts the Board's efforts away from its conciliatory function. Secondly, it is seen as quasi-arbitration and de-bunked for its attempts to give a reasoned and principled basis to its reports. And finally, the scheme is criticized in that the parties incorporate the process into their overall strategy, and attempt to use it in a tactical way. As Professor Jamieson notes:

In many cases the representatives of the parties to a dispute take rigid positions beforehand, refuse to make any substantial concession necessary to reach agreement, and then depend upon the conciliation board to get them "off the hook". More frequently, perhaps, collective bargaining does not really begin until after the lengthy and complicated conciliation procedures required by law have been completed. Each party saves its main ammunition for the conciliation board, in the hope of getting a majority recommendation that will support its case against the other party. For, to the extent that board recommendations do influence public opinion, there may be an important element in bargaining power. 32/

4. Summary

The institution of collective bargaining negotiations and the ability to strike and lockout is deeply entrenched in the Canadian Industrial Relations System. The history of the development of industrial relations in Canada has closely paralleled its American counterpart and labour's ideological commitment to collective bargaining and the right to strike is as deep and pervasive in Canada as it is in the United States. Furthermore, encouragement of collective bargaining has been basic government policy,

sanctified and institutionalized by statute for more than a quarter of a century. The process has developed a high degree of maturity and acceptance by both labour and management alike. Any attempt at significant alteration and modification of the status quo would be met with the full force of this tradition and experience.

It might be thought that the unique Canadian experience with compulsion would render the industrial relations system more amenable to a sub-system of compulsory arbitration of interest disputes than would its American counterpart. On closer analysis this does not follow. The acceptance of compulsion in Canada would seem to have derived almost entirely from the fact that the disputes for which it has been utilized have been suited for resolution by adjudication. Acceptance of compulsory adjudication of disputes over rights, jurisdiction and recognition was achieved through meaningful participation in the decision process by way of the presentation of proofs and reasoned argument. The features of compulsory conciliation which resemble a form of arbitration in that they purport to have a "judgment" made and "norms" imposed in interest disputes have not enjoyed a similar acceptance.

Finally, it is questionable whether industrial conflict in the form of strikes could ever be displaced regardless of the intrinsic suitability of the substitute. Arthur Ross makes the point in these words:

If it is granted and labor history appears conclusive on the point, that the discontent of workers is a phenomenon which grows naturally out of the master-servant relationship and that the organization of this discontent owes more to the factory system than to the labor union, then it becomes difficult indeed to share certain contemporary concerns about a "laboristic age". For this mistakes both the character and function of the labor movement, in America at least. The strike, which is the expression of labor's power, is clearly no invention of the labor

movement nor any product of trade union strategy. It is more correctly viewed as one of the data of the industrial situation and the relevant question is not whether there will be strikes but for what objects the striking power of organized workers will be used. 33

If this be so, it would be doubly unwise to attempt to alter a system which has, with considerable success, harnessed and institutionalized this latent "industrial conflict".

These observations tend to the conclusion that in the present circumstances in Canada any form of decision which significantly alters the present locus of power in interest dispute determination would not be acceptable at all to either labour or management. And any procedure which interferes with labour's ability to strike or displaces collective bargaining negotiations in any general and comprehensive way would be even less acceptable. Therefore any general scheme of compulsory arbitration regardless of its intrinsic merits would be neither feasible nor desirable.

Positively speaking, however, some restrictions on the right to strike and utilization of some form of compulsory arbitration in circumstance where the use of the strike would be detrimental to the national interest such as in wartime or in specific areas such as hospitals, firefighting, and police services would likely be more readily acceptable. And it would seem that the most acceptable form of compulsory arbitration would be the one which preserved the greatest share in the decision process for the affected parties, preferably in the form of pre-arbitral collective bargaining negotiation.

THE COLLECTIVE EXPERIENCE WITH INTEREST
ARBITRATION IN OTHER CONTEXTS

1. Interest Arbitration As A Process of Decision

(a) Theoretical Analysis

In Chapter 1, an abstract analysis of adjudication developed several hypotheses. It was suggested that the essence of adjudication as a process of decision lay in the fact that the affected parties participated in the decision process through the presentation of proofs and reasoned argument to a neutral decision-maker. It was also suggested that adjudication could not function except through the application of a pre-existing rule, standard, or principle and preserve any meaning to participation by way of presenting proofs and reasoned argument. Finally, it was suggested that problems which inherently contained "polycentric" features could not be subjected to the governance of rules, standards or criteria of a character sufficient to enable the affected parties to make meaningful reasoned arguments. And it was concluded that interest disputes were of this type. 34/

(b) The Collective Experience

The analysis of the experience of arbitration of interests would seem to clearly corroborate these hypotheses in each of three related perspectives: the participation of the parties through the adduction of evidence and presentation of reasoned argument, the development of criteria of decision, and the nature of the process of decision.

(i) The Participation of The Parties Through the Adduction of Evidence and Presentation of Reasoned Argument

In all circumstances where a form of compulsory arbitration was

utilized the parties were provided with the form of participation characteristic of adjudication — participation on an adversary basis at the hearing through the presentation of reasoned proofs and argument. Some of the arbitral machinery included a tripartite board, others provided for an individual arbitrator, but regardless of the existence or non-existence of criteria of decision all systems included a pre-decisional hearing procedure.

In Singapore the hearing was almost empty form. Professional barristers were statutorily barred from appearing before the Industrial Arbitration Court but a class of specialized amateur industrial relations advocates emerged. The advocates and Board members alike agreed that the hearing was only of use to transmit bargaining material to the partisan members and, in the hands of sophisticated advocates, to present acceptable positions to the members of the Board particularly to the neutral President or Deputy-President. In only one general situation did the parties enjoy any meaningful participation through the adduction of evidence and rational argument, the situation in which the employer was paying sub-standard wages and there was no demonstrable inability to pay on his part.

In Australia, the arbitration system is a multi-tiered apparatus. Norms, or criteria were developed by the Full Bench, or the Commission in Presidential Session and loosely tied together by the principle of comparative wage justice. At the level of arbitration by the lay Commissioners these norms provided some substance to the pre-arbitral hearings. Although there were considerable leeways in their application a sufficient element of objectivity remained to give direction to the advocates in preparing and presenting their cases. As the decisions became more fundamental, as with the national wage cases and fundamental work value cases, however,

meaningful adversary participation declined. Reasoned application of objective criteria (to the extent that it operated at the lower levels) gave way almost entirely to subjective judgments by the Presidential members of the Commission and the participation by the advocates changed in character from reasoned argument to rhetoric and rationalization.

One observer of the operation of the N.W.L.B. in the United States was of the opinion that in substance the hearings in dispute cases were useless and a frustrating source of delay but he did comment that they gave the parties the psychological feeling of "due process" (although not the substance) and insofar as this enhanced the acceptability of N.W.L.B. decisions did serve a useful function. 35/

(ii) Criteria of Decision

The most conclusive corroboration of the hypotheses that interest disputes are ill-suited to decision by adjudication derives from the almost unanimous experience with "standards" or "criteria of decision" in the various arbitral systems. The theoretical judgment was that because of the "polycentric" nature of interest disputes no criteria of decision could be developed which would adequately serve as a basis for a reasoned determination of the dispute. The collective experience both in North America and abroad seems to bear this out almost conclusively.

In Singapore the legislation providing for arbitration did not attempt to establish criteria of decision. It used the familiar "equity and good conscience" formula in its directive to the Arbitration Court. 36/ In addition, the process was "tripartite" with only the neutral members, the President and Deputy-President, being permanent. Some predictability in

the Court's decisions, however, did develop despite a conscious policy on its part not to adhere to past decisions. There, legislation passed prior to the establishment of the Court provided ready norms for a variety of fringe benefits excluding the main economic issues of wages and bonus. On these fringe issues the inherent "polycentricity" of the problem was ignored and these norms were more or less consistently adhered to by the Court. On the money issues of wage and bonus there was frequent mention made of "ability to pay", "comparability", "productivity", "cost-of-living", and "the state of the economy", but none became sanctified as a determinative objective basis for decision. There are as yet no criteria of decision identifiable as such as determinative on the issue of wages and bonus.

Australia's experience is that of a deliberate attempt and clearer failure. There the talk was of "fair shares", "needs of the worker", and "comparative wage justice". Mr. Justice Higgins' efforts in the International Harvester case provided some norms but they have proven empty and none have been devised to take their place. Some fringe issues and non-economic terms have become temporarily frozen but these do not qualify as "criteria" for dispute settlement. A comment by an active participant in a recent article aptly summarizes the situation. R.E. McGarvie, Q.C., notes, "...although there is an established body of principles of industrial arbitration the arbitrator's prime responsibility is not to apply the established principles of arbitration but rather to reach a result which is industrially just." 37/ This is exactly what appears to take place. The existing "criteria" were referred to but they did not function as such in significant determinative ways.

The situation in which arbitration was utilized in the war years through the N.W.L.B. was more suited to the development of criteria of decision. There, the over-riding policy was wage stabilization, at least from 1942 onwards, yet the consensus was that the development of criteria of decision, particularly on economic issues left much to be desired. The N.W.L.B. did develop a code of "principles" or norms but a lack of consistency in their application and their frequent change tended to derogate from their character as "criteria" of decision. Professor Derber noted that:

The principles established by the Board to apply to the settlement of other types of disputes cases were not all as clear-cut as maintenance-of-membership. Many of them varied considerably in precision of statement as well as in regularity and consistency of application. 38/

Finally, Bernstein's analysis of the development of criteria and the frequent reference to several conflicting and unrelated standards in the written reasons of the arbitrators substantiates the judgment that they do not fulfill the function of providing an objective criterion for the reasoned application and resolution of interest disputes.

(iii) The Decision Process

As a final corroborating perspective to the hypotheses that "interest disputes" are ill-suited to resolution by adjudication a brief summation of the operation of the actual arbitral decision process is appropriate. Where the arbitration board was "tripartite" in nature its decision process was one of bargaining and agreement rather than of reasoned application of objective criteria. In Singapore the participants almost always expressed their function as being that of a negotiator. The National War Labor

Board in the United States regarded the tripartite institutionalization of bargaining as one of its greatest strengths and a main reason for its success. In Australia, the Presidential decision processes were regarded as a form of negotiation rather than as adjudicatory and the lay Commissioners who, of all, most closely approximated adjudicators tended not to regard themselves as such but rather as mediators who when forced to make a decision did so on an arbitrary and pragmatic basis. Indeed, in no situation was the position taken that these decisions were in reality the product of a reasoned application of generalized standards or principles.

(c) Conclusions

In concluding his paper on compulsory arbitration, 39/ Professor Phelps stated that his, "essential argument...[was] that the judicial process has not yet been proved inappropriate to labour-management disputes". 40/ The analysis of adjudication and its appropriateness for determining labour-management disputes over interests made herein and the collective experience, both foreign and North American, of arbitration of interest disputes clearly points to contrary conclusion.

Adjudication, as it has been defined — a process of decision whereby the parties to a dispute share in its disposition through the presentation of proofs and reasoned argument to a neutral decision-maker — would seem to be singularly ill-suited for handling labour-management disputes over interests. Because of the polycentricity of the problem, no workable criterion can either be established or evolved on a case by case basis. The form is left without substance. Neither the decision-maker nor the participants can direct themselves to a reasoned solution of the problem at hand with the result that the only consequential role in the decision

process is that of the arbitrator. For these reasons the adjudicative form of decision is quite unsuited and undesirable as a method for the arbitration of "interest" disputes.

Some form of non-adjudicative "tripartite" arbitration has received a much greater degree of acceptance in the North American context and it would appear to be clearly preferable. The National War Labor Board experience was that the "tripartite" form was essential to the achievement of any degree of acceptability by the parties. In reporting on its functioning McPherson considered that the tripartite form, despite the delays it occasioned, was by far the most acceptable to both labour and management. 41 And Emmett McNatt pointed out that where there was a choice available that an overwhelming preference was shown for tripartite panels. 42

The reason for this preference for the tripartite board is clear. Through it the parties retained a greater degree or portion of influence on the ultimate decision. Instead of being an attempt at adjudication, the tripartite tribunal functioned as a form of negotiation and it thereby preserved some participation through the performance of the partisan members on the Board.

2. Arbitration and Collective Bargaining

The general experience with arbitration of interests in Singapore, Australia and North America tends strongly to the position that for the parties to retain a consequential role in the determination of disputes over interests this must take the form of negotiation, either antecedent to arbitration or within the arbitral decision process. The alternatives of administrative determination and adjudication do not provide any sort

of substantial participation. However, the most frequently expressed criticism of so-called "compulsory arbitration" in any form, is that its functioning as a terminal variant to collective bargaining negotiations "weakens" or "undermines" the negotiation process. The substitution of interest arbitration for the right to strike does alter and affect the collective bargaining process. The critical questions are in what way and how significantly?

(a) Theoretical Analysis

Stevens' analysis of collective bargaining negotiations has its theoretical basis in conflict-choice behavioural theory and he postulated that collective bargaining negotiations were instances of the "avoidance-avoidance" type of conflict-choice behaviour. That is, he believed that the parties became conflicted between two negative goals whenever a strike was threatened and he postulated that their behaviour in this situation should be to select neither goal but rather to seek to avoid both through an alternative course of action — negotiation to a compromise position. He went on to state that only in situations in which both parties were conflicted sufficiently to be in equilibrium between the two goals could real negotiation be expected.

In conventional situations this equilibrium is created by the strike or more precisely by the existence of the possibility of a strike. The union by demanding increased wages and better terms and conditions of employment and by threatening a strike if its demands are not granted generally will conflict not only the employer involved but also itself. The employer is put in a position of having to either concede to the union or take a strike. The union too must either strike or accept the employer's

position. Thus by threatening to strike if its demands are not met the union has created both costs of agreement and costs of disagreement for itself and management. If the costs are sufficient an "equilibrium" position will be created mounting pressure on both to seek an alternative course through negotiation.

Stevens postulated that the ability to strike created the bargaining power inherent in the situation but he further suggested that the process of negotiation gave rise to a form of contrived power which he termed "negotiating power". In his view this derived from the inherent uncertainties present in collective bargaining negotiations and the skill of the negotiators in playing upon their opponent's preference and opportunity functions. An analysis of the tactics and strategies available to negotiators in the two stages of the negotiation of a collective agreement constituted his model of the negotiation process.

To determine the effect of arbitration on collective bargaining negotiations the data acquired was directed to two general questions: (1) Can a threat of arbitration create the same sort of conditions as does a threat to strike? and (2) What effects does arbitration have on the tactical operations of negotiators when it is present as a terminal variant of collective bargaining negotiations?

(b) The Collective Experience

(i) Arbitration As A Strike-Like Institution

There would appear to be two related factors connected with the institution of arbitration that operated to create a conflict-choice equilibrium. One is the "costs of arbitration" which operate as "costs

of agreement". The other consists of the expectations associated with the outcome of arbitration and acceptance of an opponent's offer. That is, a party was conflicted on occasion by his judgments as to the possible outcome of proceedings to arbitration and his alternate choice of accepting his opponent's position.

A. Costs of Arbitration: Real economic costs were always present. In Singapore they were of a substantial effect. Preparation for a long hearing and the hearing itself was costly and for the smaller employers and most trade unions they generated a real cost of disagreement. One American employer was considerably affected by this as the parent company was sure to fly over an American labour lawyer and charge the expense to the local operation. For the larger employers, for those who belonged to one of the two management organizations and for the unions employing full-time personnel this factor did lose some importance. Similarly, Professor Arthurs, in his study of the Ontario Hospital experience, found that the cost of arbitration was significant to the smaller unions. In Australia the situation was different. The established system of arbitration had generated a vested interest in the management and union officials. Often their salaries were earned through arbitration although in one case studied an overworked union leader certainly resented the time cost of arbitration.

In all situations, delay was a real cost to employers and employees alike although not necessarily equally or consistently. In Singapore where awards were not always fully retroactive, the trade unions in particular saw the delay associated with arbitration as costly.

Related to these costs were what can be termed "psychological" costs. Singaporian employers disliked having to take the witness stand and be

examined by their employees or other trade union officials. Similarly, they disliked having any confidential information made public in the process and not wishing to divulge their financial situation truly conflicted some employers. There was no similar experience observed in Australia but Professor Arthurs in his study noted that where the unions had strongly committed themselves as disapproving of arbitration they found having to go to arbitration as costly in that it violated their philosophical position. Finally, arbitration tended to deprive the union leaders from being seen intra-organizationally as "bringing home" the bacon and this had a disruptive effect on the union-management relationship with the result that management as well as union leaders interpreted this as a "cost" of arbitration.

B. Expectations As To Arbitration: The Singapore system was three-tiered in operation: direct negotiation, conciliation and tripartite negotiation. The position of the Arbitration Court was clear on a number of fringe items but uncertain as to wages and bonus. In cases where the issues in dispute were readily predictable settlement was usually achieved but the process could not be described as genuine negotiations. It derived rather from a feeling of futility. The only instance in which a conflict was created was when the parties expected arbitration to be better but not much better than accepting their opponent's position. It would be fair to say that as the chances of doing better at arbitration increased the desire to compromise and negotiate decreased. This is hard to separate from the other "cost of arbitration" at work and from strategies designed to get a "leading norm" established but this sort of behaviour did appear to be generally present at the two pre-arbitration stages.

This behavioural pattern was much more evident in the tripartite working of the Arbitration Court although it varied depending upon the initiative assumed by the neutral third party. When a representative member believed that an award might be similar to the position taken by his opponent he was strongly motivated to seek a compromise position through negotiation with his counterpart and working on the neutral member's preferences. When the neutral third party began to assume the initiative and indicate a compromise position this tended to make the negotiators adopt a "take it or leave it" final position. The President did not have to accept "one or the other" of the two positions and this tended to undermine the negotiation as time passed.

The Australian experience was not as fruitful. A "Boulwarism" approach existed when it was clear that arbitration would be far less desirable to the union than acceptance of the company offer. At the lay commissioner level agreement could be reached frequently through the commissioner indicating that he might side with a negotiator's opponent. But only one case was studied where both negotiators felt conflicted and believed they could do better through negotiation. Here there was a quite abnormal degree of uncertainty as to what the arbitration result would be, coupled with a clear belief by both negotiators that it would bring some increase in wages through the medium of an "industry allowance". As well, in that situation there were considerable direct costs at play. In most cases, however, the parties often felt that there was a good chance to do better in arbitration and when they were of this view they were reluctant to show any conciliatory or compromising response.

Professor Arthurs' study of the Ontario Hospital does yield one bit of evidence relevant to this matter. In general, both union and management believed that negotiated results were more beneficial than would have been the case had there been an arbitration. ^{43/} These attitudes or "expectations" are ideal to "genuine" negotiation.

(ii) Effects On The Negotiation Process

Closely related to the foregoing analysis is the effect on the tactical moves and strategies adopted by the negotiators where arbitration was present as a terminal variant to collective bargaining negotiations rather than strike negotiations. The relevance of the data is similarly restricted as actual case studies were only made in Singapore and Australia.

A. Tactics: In Singapore generally the negotiation process was genuine in the sense that a full mix of tactics was utilized both tactics of persuasion and tactics of coercion. If anything, there tended to be a greater reliance of tactics of persuasion but this generalization is difficult to substantiate. A basic and typical coercive tactic related to an employer's assertion that agreement on anything less than his terms would result in retrenchment and loss of jobs. In bargaining at the arbitration level in the tripartite sessions, yielded threats of resignation or unacceptability were occasionally used.

In Australia there were only a few instances where it could be said that any negotiation operated within the arbitral system but when it did a full range of tactics were utilized with a tendency to rely more on tactics of persuasion based on data from other awards. Generally, it could be said that the use of tactics was not seriously interfered with where "genuine" negotiations took place.

B. Incorporating The Arbitration System: Quite naturally and quite clearly the negotiators adopted and integrated the arbitration system into their negotiation strategy. In Singapore it was a difficult decision for negotiators to come clean prior to mediation. If they did and did not reach a settlement then the pressures of the mediation system would almost always result in some modification. This tended to keep negotiators from making a final offer prior to mediation. Similarly, if arbitration was a likely prospect there were clear indications that the negotiators tended to keep some bargaining room open for the "tripartite" sessions following the hearing.

Australian experience was not clear on this characteristic and cannot be called upon to be of much help. The commentators on the American experience, both the N.W.L.B. and the State systems, however, suggested that a similar pattern prevailed there as well. Of course, this is not surprising, for in negotiations where a strike possibility exists negotiators will frequently "save something" for strike negotiations.

C. Arbitration Providing A Deadline: The function of providing a deadline similar to that supplied by setting a strike date was fulfilled in Singapore by setting an arbitration date. In a number of instances the institutional mechanism of listing a case for a hearing did function to provide a fixed point in time — an eleventh hour — and it was utilized by skilled negotiators for that purpose. In Australia, negotiations were open-ended but there was a hint in one case of the date for hearing operating as a deadline mechanism.

Negotiation at the tripartite discussions of the Singapore Industrial Arbitration Court had no deadline apparatus and there was no indication

that one was ever imposed. Characteristically, the decisions were reached as the President or Deputy-President revealed his position and assumed the initiative.

(iii) Some Qualifications

A. The Attitudinal Factor: The attitudes of the participants and the power relationships in the larger context obviously and demonstrably did play a significant part in the acceptance and functioning of bargaining in conjunction with arbitration. The clear policy of preserving bargaining and its concurrence by both labour and management in the emergency context in which the N.W.L.B. operated contributed significantly to its record. The "habit" of collective bargaining also played a part.

In Singapore there was a clear legislative policy that collective bargaining was not to be supplanted by arbitration and the Industrial Arbitration Court, as did the N.W.L.B. in the United States, often refused to hear cases until there had been further attempts at negotiation. Both labour and management as well as desiring direct negotiation were under political pressures to display maturity and stability in their relations through collective bargaining negotiations and these influences and attitudes tended to make the negotiation process function. Professor Arthurs suggested that the union's philosophical disapproval of arbitration operated as a pressure to keep it negotiating in a genuine way. And negatively, the general acceptance of the view in Australia by both labour and management that the arbitration system was better than collective bargaining tended to discourage serious attempts to negotiate.

Thus, attitudes of the parties, their willingness or unwillingness to negotiate and attempt to reach an agreement without resort to arbitration, generally, apart from the internal factors creating conflicts, would appear to be significant to the success of negotiation but this, too, is almost impossible to quantify.

B. The Presence Of Direct Sanctions: In the majority of situations studied in Singapore, there was an equilibrium created resulting in real negotiations. Most often it was sufficient to lead to agreement. But it was not always solely the product of the "costs of arbitration". The ability to institute a variety of forms of industrial action including "go-slows", quickie strikes and retrenchment were often unspoken but real factors underlaying negotiations. Similarly, in Australia, an element of conflict in the form of a strike, go-slow, or prosecution under the penal clauses added to the negotiatory context. It would appear from the strike statistics in the United States during the years of the N.W.L.B. that this was so there as well. Presumably, it was not in the Ontario Hospital situations but this is not directly alluded to by Professor Arthurs in his study.

(c) Conclusions

The lack of a comprehensive and adequate sample of negotiating experience in North America where compulsory arbitration has functioned as a terminal variant to bargaining and the peculiar features of the Australian and Singaporean industrial relations systems make any conclusions conditional ones only. Nevertheless the experience examined would seem to make significant inroads into the position that arbitration will destroy collective bargaining negotiation. That is plainly not the case. The substitution

of a form of interest arbitration does affect both the underlying power relationships and the conditions for genuine negotiation but there is little evidence to support the conclusion that arbitration does attenuate or subvert collective bargaining in any significant degree. Indeed, there are clear indications that arbitration can create a situation which will invoke the processes of concession and compromise. In Singapore, less than 3% of all the potential arbitration cases actually were arbitrated upon. Under the N.W.L.B. in the United States during World War II more than 90% of the potential arbitration cases were settled privately. And, the recent experience under the Ontario Hospital Arbitration legislation is comparable.

On the other hand, there can be little doubt that the arbitration system, in Singapore at least, did alter the underlying power relationships. It did have the tendency of equalizing the bargaining power, making the weaker unions and managements stronger and vice-versa, although not completely. In Singapore (and in Ontario) the smaller organizations were more vulnerable to the direct costs of arbitration. In Singapore, during the pre-1965 period, this probably favoured the unions but no data could ever be compiled to support this. And, it would be even more difficult to assess the 1965-67 period from that perspective. All that can be said is that the power structure was altered.

Again, generally speaking, the attitudes toward the processes were significant. If there was a desire to make negotiations genuine, an active policy by the arbitral tribunal to discourage arbitration and to return disputes for further bargaining, and a preference for negotiation rather than arbitration, this appeared to contribute considerably to real negotiation. Indeed, Professor Arthurs' study and the Singapore experience would

tend to corroborate the suggestion that the parties' mutual abhorrence of arbitration can be institutionalized and that it will contribute to continued negotiation despite the present alternative of arbitration.

The tactical operations and the deadline function of the strike do not appear to be significantly affected by substituting arbitration as a terminal variant. The strategy of the negotiators changed to accommodate arbitration and the tactical mix varied but this aspect of collective bargaining was not subverted. And as the Singapore experience bears out the listing of a case for hearing can very neatly fulfill the deadline-function.

Translating this experience into the framework of the three aforementioned theoretical models, the adjudicative model, non-adjudicative tripartite arbitration, and the "one or the other" type, the major hypotheses appear to be born out despite the fact that no situation examined corresponded entirely to any of the three abstract forms.

No system corresponded to the adjudication model which is not surprising in view of the suggestion that adjudication is ill-suited to the resolution of interest disputes. The Australian system, and in particular the aspect of arbitration by lay commissioners was avowedly an attempt at adjudication and the Singapore, N.W.L.B. and Ontario Hospital systems although tripartite on occasion purported to act adjudicatively, particularly where clear norms on fringe issues were developed.

The experience in these situations does corroborate Stevens' general hypothesis. He suggested that if the arbitral process was adjudicative, and purported to apply objective criteria and that where this worked the

result would be quite incompatible with collective bargaining negotiations. 44/ In Singapore clear norms developed on a number of fringe matters as they did in Australia. The resultant effect was a high degree of settlement (the only cases not settled were cases attempting a breakthrough and the establishment of a new norm) but these settlements were out of a sense of futility rather than through negotiation.

The experience studied most clearly approximated the second model of arbitration, non-adjudicative tripartite board although the form was somewhat impure. In Singapore and in the N.W.L.B. the boards did purport to apply existing criteria of decision and the parties were given an adversary process and hearing. In no situation was the neutral third party compelled to side with one party or the other and the inevitable result was some sort of compromise. Where "compromise" tended to be the posture and policy of a tribunal Stevens further suggested that the parties' negotiation conduct would be to retain extreme positions and save themselves for the inevitable compromise. 45/ The experience in Singapore and Australia bears this out in part but not completely. Costs of arbitration and the real uncertainty of the likely arbitral decision did provoke conciliatory responses.

But the most successful arbitral conduct resulted when the third party arbitrators acted as if they would decide with either one side or the other. The President of the Singapore Arbitration Court occasionally adopted this approach with success. One Australian Commissioner frequently adopted the same tactic in his pre-arbitral conciliation sessions. And the Labour Ministry in Singapore with its control over submissions to arbitration experienced some success with a similar approach. This again corroborates Stevens' general conclusion reproduced as follows:

The argument of this paper leads to the conclusion that a strong compulsory arbitration system may be compatible with collective bargaining. By a "strong" system is meant one in which (1) resort to a strike or lockout is really precluded, (2) either party can invoke arbitration (in which event it is never refused), and (3) a tripartite authority (or a one-party authority operating without a hearing) bases its awards on the one-or-the-other principle. The availability to the parties of an arbitration strategy under this type of system would seem to serve some of the functions usually associated with a strike strategy. For example, the arbitration strategy affords a technique imposing a cost of disagreement and thus for evoking the negotiatory responses of concession and compromise. It is also true, in a general way, that the "particular-solution" function of the strike strategy is served — for just as the parties may use the expected cost of a strike as a benchmark against which to measure the cost of particular concessions, so might they use the expected (opportunity) cost of arbitration. 46

WHAT GENERAL FORMS OF INTEREST ARBITRATION WOULD BE MOST SUITABLE FOR USE IN THE CANADIAN INDUSTRIAL RELATIONS SYSTEM?

1. Introduction

The Canadian industrial relations system has had a long tradition of collective bargaining as the main vehicle for regulating relations between labour and management. Not only is collective bargaining consonant with the general prevailing ideology which favours private decentralized decisions in the field of industrial relations but also it is strongly preferred to any sort of unilateral direction by either government or management. This process coupled with the "right to strike" has been the key regulatory process in Canada for the past 30 years. To substitute any alternate form of decision-making in a general way would be an almost intolerable wrench for the system regardless of the character of the alternate process.

Furthermore, the collective experience of a number of jurisdictions, both in North America and in foreign jurisdictions, has been that the judicialization of interest disputes is wholly unsatisfactory in preserving

any meaningful role or participation in the decision process for the parties by way of presenting proofs and making reasoned argument for a disposition in their favour. The only hope for retaining any consequential role for the parties affected in a system of interest arbitration is through negotiation either in the form of pre-arbitral bargaining or by way of a tripartite board or both. The intractable difficulty, however, would seem to be that no arbitral system can perfectly simulate the functions of a threat to strike.

Thus, the use of any form of arbitration machinery for the determination of interest disputes in Canada in the present circumstances (apart altogether from a form of incomes policy administration which is beyond the scope of this report) would seem to be quite restricted and secondly its acceptability and success would vary directly with its compatibility with collective bargaining negotiations, both prior to arbitration and in the actual arbitral process. This would seem to limit arbitration to three distinct situations: (1) a general voluntary procedure, (2) specific comprehensive schemes in "critical" areas, such as police hospitals, etc., and (3) ad hoc arbitration for emergency disputes.

2. The Advantages and Disadvantages of The Several Models

(a) The Adjudicative Model

As has been made clear, the use of a form of adjudication for determining "interest disputes" is severely limited. As a process itself it is singularly ill-suited to the matter and would be functional only in exceptional circumstances where a criterion based on "comparability" is both feasible and desirable. And in situations where it will work, it will have

the further undesirable effect of displacing pre-arbitral bargaining. Successful adjudication of interest disputes is incompatible with negotiation.

(b) The Non-Adjudicative "Tripartite" Model

The experience with this model as mentioned is somewhat distorted. It tended to be mixed with some attempt to adjudicate albeit unsuccessfully. The National War Labour Board, the Singapore Industrial Arbitration Court and the machinery of the Ontario Hospital system were all of this character as they purported to apply criteria of decision in some situations and they provided a hearing process. This process, however, was more formal than substantial and the collective experience indicated that the attempt to apply criteria was unsuccessful. Because of this and because of the character and operation of the tripartite board some degree of compatibility with collective bargaining negotiation was experienced; the bargaining taking place both prior to arbitration and within the tripartite board.

Without any restriction on this decision process, compromise is inevitable and where this exists the participation by way of negotiation, both prior to arbitration and in the tripartite decision process, is lessened. The inevitable behaviour of negotiators at both levels is to withhold something or distort the actual positions in an attempt to compensate for the compromise. As a result, this form of arbitration has a built-in tendency to create a "gap" rather than a "contract zone". Just how serious this weakness is is difficult to measure.

On the other hand, the fact is that the form of "justice" is preserved through a hearing and by virtue of written "reasoned" opinions, its acceptability can be enhanced. This was the view of the participants in the

National War Labour Board system. Of course any such process is vulnerable to falling into disrepute as being fraudulent. 47/

Nevertheless, despite its contradictory tendencies, and despite its vulnerabilities, it has enjoyed the greatest use and could be viewed as the "safest" form of machinery if not theoretically the most sound in design. Bargaining is not likely to be substantially displaced yet it will suffer some weakening and attenuation.

(c) The "One or the Other" Model

This model has as its essential characteristic the feature that the neutral decision-maker is restricted from deciding other than on one of the parties' final positions. It has never been tested under fire yet it makes the most sense rationally as a device for retaining a maximum of participation for the parties in either pre-arbitral bargaining or in bargaining within a tripartite tribunal. Stevens' analyses this model in a most persuasive way:

Type I. Phase 1: direct negotiation between the parties with no third-party participation. Phase 2: the arbitration authority makes its decision with no further hearing, i.e., on the basis of the record generated by the parties during Phase 1.

Type II. Phase 1: as above. Phase 2: the arbitration authority makes its award after a hearing, i.e., the parties present their cases during the arbitration phase, and the arbitration authority is tripartite, composed of representatives of the parties as well as (a minority) of impartial third-party members.

Under Type I, the final prearbitration positions are those occupied by the parties just before the arbitration phase begins. Under Type II, because of the provision for a hearing and because of the tripartite nature of the arbitration authority, the arbitration phase itself is very apt to involve negotiations. Hence, the final prearbitration positions to which the one-or-the-other criterion refers may be positions occupied during the arbitration phase, but before the authority has rendered its decision.

Under Type I, the one-or-the-other criterion is well designed to encourage genuine prearbitration negotiation. Generally speaking, this criterion generates just the kind of uncertainty about the location of the arbitration award that is well calculated to recommend maximum notions of prudence to the parties and, hence, compel them to seek security in agreement. Moreover, under this criterion — and unlike the case under the compromise criterion — there is no reason to suppose that big claims may be rewarded and concessions penalized. Indeed, expectations may tend to be the other way around, as each party may assume that the arbitrator will reject an "exaggerated" position in favor of an opponent's more moderate claim.

The writer knows of no examples of Type I compulsory arbitration of new contract disputes operated under the one-or-the-other criterion. In principle, such a system would run the danger of generating unworkable awards and, hence, of breaking down. This would be likely if for some reason the system failed to evoke genuine prearbitration negotiation. In this case, the arbitration authority might be forced to choose between two extreme positions, each of which was unworkable to one (or even both) of the parties. Although this danger exists in principle, there is no prima facie reason why it would be likely to eventuate in practice. Indeed, assuming that the parties are not deliberately attempting to subvert the system, this very danger might provide them with additional incentive to seek security in agreement.

Under Type II, the one-or-the-other criterion is also well designed to encourage genuine negotiation, and what has been said about Type I applies here as well. Two major differences may be noted. The arbitration hearing phase under Type II is very apt to involve mediation; this may be an advantage. Also, under Type II, the independent members have considerable control over the outcome. They will vote with one side or the other to establish the award, and this provides them with potentially usable power. Thus, for example, the independent members may convey to party A that his position seems unreasonable, and therefore they see no real choice but to vote with party B. Across the hall, so to speak, the same point (in reverse) may be made to party B, i.e., that the neutral members see no real choice but to vote with party A. Working both sides of the street in this fashion, the neutral members may be able to induce the parties to converge on an outcome deemed by them to be appropriate. From one point of view, this may be an advantage in that it helps to preclude the situation in which the arbitration authority is forced to choose one of two unworkable or undesirable positions. (Neutral member power of this kind may not, however, be an unmixed blessing, as the discussion in the next section will suggest.)

This model has the clearly attractive characteristic of containing strong support for collective bargaining negotiations. Its most serious

fault is that it is "gimmicky", 48/ and its "gambling" character might be regarded as totally unacceptable by the parties concerned. Although this could be muted somewhat by providing a choice between this form and another form of arbitration. 49/ Another fault is that it would tend to allow the union to get at least something as the union would always be free to make demands without any countervailing cost. 50/ Despite these shortcomings, 51/ however, its unique ability to simulate the necessary conditions for collective bargaining negotiations makes it worthy of some further examination. Chamberlain in commenting upon its potential concluded that:

In some circumstances this procedure could, of course, result in an unreasonable award which might discredit the system, but it is possible to imagine situations in which a rumoured intent to invoke this particular type of arbitration might be effective on an intransigent party. 52/

(d) Some General Considerations

The real costs of arbitration encourage bargaining to some extent and should not be discounted despite the apparent irrationality of making arbitration costly, lengthy and unpleasant. Both in Singapore, and Australia, this was of considerable significance and had a direct bearing on the conduct of the negotiations studied. As well, where possible and feasible, the arbitration tribunal should be free to return cases for further attempts to negotiate a settlement. This device worked to facilitate bargaining both in Singapore and at the N.W.L.B.

If the tripartite form is adopted it will be most effective as a bargaining forum if the partisan representatives are closely related to the disputants. They should not be the actual negotiators for no other reason than a change of personnel should facilitate negotiation but if

possible they should be senior officials of the two institutions party to the dispute.

Finally, the need for a deadline should not be overlooked. This is automatically provided by the listing of a case for arbitration but the tripartite session is left open-ended. Some requirement that a decision be reached in a fixed period of time unless altered by a unanimous position would probably suffice.

3. Interest Arbitration Forms and Their Uses

The contrived nature and inherent flaws in the arbitral models described above dictate a policy of caution in their use. This together with the contextual features of industrial relations in Canada would seem to require a quite restricted role for compulsory arbitration at the present time. Nevertheless, some situations may require proscription of strikes and a form of arbitration as the only real alternative and secondly, there would not appear to be any reason why some form of voluntary machinery should not be available generally.

(a) Specific Comprehensive Systems of Compulsory Interest Arbitration

There are some labour-management situations in which the exercise of the ability to strike can inflict excessive costs on the surrounding social order. Police, firefighting and hospital services are obvious examples. The Civil Service is less "critical" but might well be judged as requiring a comprehensive compulsory system where the ability to use economic sanctions was proscribed. The actual choice of the use of arbitration involves a careful weighing of a number of variables beyond the scope of this report.

What is to be considered herein is the optimum form for use as a comprehensive system of compulsory interest arbitration.

The fact that the system would be "industry-wide" makes either form of the "one-or-the-other" model infeasible. Comparisons will naturally develop and any sort of "one-or-the-other" could result in disparities that would be too irrational to be acceptable. On the other hand, a form of adjudication would only be feasible where a clear "comparability" standard could function. And where this was so, collective bargaining negotiation would be supplanted. In any event, adjudication would rarely be suitable and therefore by process of elimination the general form of the non-adjudicative tripartite model would be the most satisfactory.

It has the advantages of not wholly undermining bargaining especially if no attempt is made to apply criteria of decision in any rigorous way. The ideal would be to specify a valueless "standard" such as "equity and good conscience" and to specify that awards should be in the form of statements of terms and conditions with no written reasons. The hearing will serve a psychological function and also add to the costs of arbitration but should not be expected to yield any sort of meaningful participation in the decision process. Strikes of course will be restricted and access to the arbitral authority should be available at the instance of one party.

If the neutral arbitrator is skillful and restrains himself from assuming the initiative and if the representative members are closely connected to the disputants, negotiation as the mode of participation afforded the effected parties should not be significantly subverted.

The neutral members could be permanent or selected on an ad hoc basis. If the selection is on an ad hoc basis it would tend to increase the uncertainty of their resulting awards and thereby enhance the negotiation process. On the other hand, a permanent neutral member or panel of neutrals might be deemed more desirable from the point of view of maintaining some consistency. This factor will depend upon the specific area in question, i.e., under the Ontario Hospital an ad hoc process has been adopted whereas in the Federal Civil Service scheme a permanent tribunal was established.

(b) Ad Hoc Compulsory Arbitration

There is a possible use of compulsory arbitration on an ad hoc basis either singularly or as part of an "arsenal of weapons" available to government for dealing with "emergency" disputes. It is in this context that a use for "one-or-the-other" arbitration ought to be considered. "One-or-the-other" arbitration has the strongest features for encouraging negotiation and this would be consistent with a general strategy of government in using ad hoc statutes or the arsenal of weapons to create that sort of pressure by threatening arbitration.

The objection to the union always getting something would not be significant in this context. The possibility of an unworkable result being reached can be countered through the provision of an appeal to either a senior government official or another labour relations tribunal to "show cause" why it should not be implemented, and the "contrived" or "gimmicky" quality of this form would be softened if the tripartite form plus a pre-arbitral hearing were utilized. If this were done it would be of even more importance to ensure that the representative members of the panel had a reasonably close affiliation with their principals.

The "one-or-the-other" formula would be best utilized if the neutral member was required not to draft any award but restricted only to choosing between the drafts of a final position of both of the representative members. And here some mechanism for establishing a deadline within the tripartite decision process would be highly desirable.

(c) Voluntary Interest Arbitration

As mentioned above nothing would be lost in establishing arbitration machinery which would be available if selected by a joint agreement to forego the use of strikes and lockouts and accept an arbitral decision as final. This sort of statute could serve two purposes related to compulsory arbitration. In the first place, it would be available for use as part of an arsenal of weapons or as an ad hoc device. Its presence in legislative form would be a more effective threat. And secondly, it would provide a good opportunity to acquire some experience with the "one-or-the-other" model.

In this regard, again, the tripartite form described above would be most feasible as the voluntary format would tend to dampen the "continued" character of the machinery.

4. Summary and Conclusion

Clearly arbitration is ill-suited to the resolution of interest disputes if the affected parties are expected to retain substantial consequential roles in the decision process. Adjudication is an inadequate substitute. Non-adjudicative tripartite arbitration retains some participation through pre-arbitral bargaining and the operation of the tripartite tribunal although this is less than perfect where the neutral member can

render the decision a compromise. All or nothing arbitration in theory would seem to be the most functional for the preservation of bargaining both prior to arbitration and within the tripartite authority yet it appears to be somewhat contrived and nothing more than a gimmick.

The experience in Singapore, at the N.W.L.B. and under the Hospital legislation in Ontario, does, however, indicate that a form of non-adjudicatory tripartite arbitration will not attenuate and undermine the bargaining process unduly and that its acceptability to the parties might not be as unsatisfactor, as is often voiced. Indeed, the general abhorrence of arbitration by both management and labour can work to make pre-arbitral negotiation more efficacious.

The purpose of ad hoc arbitration and arsenal of weapons strategy to the extent that it is to encourage disputants to make greater negotiatory efforts would seem to readily fit with the imposition of "all or nothing" arbitration. An experiment of this sort might be worth the risks involved. In any event an attempt to have the model tested through machinery for voluntary submission to arbitration could cause little harm.

In general, in the Canadian context there is only a very restricted role open to arbitration of "interest disputes". The fact that bargaining gives labour and management consequential roles in determining the terms and conditions to regulate their relationship and the unique suitability of the negotiation process for providing this renders any significant alteration through arbitration infeasible. The traditional, ideological and psychological commitment to the availability of the strike weapon compounds the problem. And finally, the inadequacies of each form of arbitration make its utilization quite restricted under the present conditions.

REFERENCES

- 1/ Dunlop, Industrial Relations Systems, New York: H. Holt, 1958.
- 2/ See, infra, pp. 1-3.
- 3/ No attempt will be made to do a close sociological study nor a careful analysis of industrial relations in Canada. All that will be attempted is a brief statement of the most obvious characteristics and their general implications. Generally see: Woods & Ostry, Labour Policy and Labour Economics in Canada, Toronto: McMillan of Canada, 1962. Kovacs (ed.), Readings in Canadian Labour Economics, Toronto: McGraw-Hill, 1961. Lipton, The Trade Union Movement of Canada, Montreal: Canadian Social Publications Limited, 1966. Carrothers, Collective Bargaining Law in Canada, Toronto: Butterworths, 1965. Jamieson, Industrial Relations in Canada, Toronto: McMillan, 1957.
- 4/ Jamieson, Industrial Relations in Canada, Toronto: McMillan, 1957.
- 5/ Ibid. p. 3.
- 6/ Ibid. p. 4.
- 7/ Ibid.
- 8/ c.f. Jamieson, supra, n. 4 at pp. 10-17, where he says attitudinal economic and geographic factors have contributed to a problem of greater resistance by Canadian employers with the result of slowing trade union growth. This, however, would not seem to be of determinative importance to the central question in the chapter, viz. can interest arbitration be integrated into the Canadian industrial relations system.
- 9/ See, Jamieson, "Industrial Relations and Government Policy" in Kovacs (ed.), "Canadian Labour Economics", supra, n. 3 at pp. 144-8.
- 10/ Jamieson, supra, n. 4, p. 5.
- 11/ For a precise account see: Woods & Ostry, supra, n. 3, pp. 72-86.
- 12/ See generally, Carrothers, supra, n. 3, pp. 75 et seq.
- 13/ This has been estimated at approximately 5% of the labour force see, Jamieson, supra, n. 4, p. 110. Generally, its jurisdiction is limited to federal government undertakings, the civil service, and inter-provincial industries such as transportation and communication.
- 14/ See generally, Carrothers, supra, n. 3, pp. 32-71.
- 15/ See Woods & Ostry, supra, n. 3, pp. 72-86.
- 16/ Ibid.

17/ e.g. Jamieson, supra, n. 4, in comparing Canadian policy to the American said at p. 102:

Government industrial relations policy in Canada has generally shown a greater thread of consistency. Prior to World War II it was modelled more on the British than on the American pattern, and was modified by experience with problems more or less peculiar to Canada. It has been expressed in a large number of Federal and provincial statutes going back to the 1870's. As compared with the United States, it has shown from the beginning a marked pre-occupation with attempting to settle disputes and prevent strikes, rather than with protecting the rights, liberties, and prerogatives of one or other of the contending parties. And, again in contrast to the United States, Canadian legislation for almost fifty years has placed its major emphasis on compulsory intervention and restriction of unions' and employers' freedom of action as a means for settling disputes.

18/ Ibid. pp. 102-3.

19/ See, Woods, "Canadian Collective Bargaining and Dispute Settlement Policy: An Appraisal", in Kovacs, supra, n. 4 at pp. 240-41.

20/ See, infra, p. 246. Note further a comment by Woods, in "Canadian Collective Bargaining and Dispute Settlement Policy: An Appraisal", in Kovacs, supra, n. 4 at p. 236, where he says:

The logical extension of the idea of compulsory recognition is compulsory bargaining in good faith with the object of signing a collective agreement. This principle has been incorporated generally in Canadian Law. But it is more than an extension. Compulsory recognition alone may reflect a bias in state policy toward collective bargaining, but compulsory bargaining, spelled out as an obligation, indicates state approval and overt support of a system of labour relations involving collective bargaining and collective agreements. Its intent is, undoubtedly, to strengthen the bargaining power of labour in relation to the power of management.

21/ See generally, Woods, supra, n. 24, pp. 240-50.

22/ Carrothers, supra, n. 3 at pp. 68-69.

23/ See generally, Carrothers, supra, n. 3, pp. 70-71, and Appendix E.

24/ Ibid.

25/ Really, a fourth form of compulsion exists in most Canadian jurisdictions — compulsory adjudications of jurisdictional disputes. For a short comment see Woods, supra, n. 24.

26/ It is difficult to say whether or not there has been more compulsory arbitrations of interest disputes in the U.S. than in Canada. The

National War Labour Board was a substantial experience in compulsory arbitration unparalleled in the Canadian experience. And, the Taft-Hartley provisions and the various State arbitration acts would seem to have provided a higher incidence of interest arbitration until recently at least. Generally speaking, however, it is true to say that compulsory arbitration of disputes over interests exists at present only at the periphery of the two industrial relations systems.

- 27/ In the United States under the Wagner Act there was and is no requirement that the parties provide a procedure for the final and binding settlement of disputes arising from the application and operation of agreements. Nevertheless, it has been estimated that well over 90% of all collective agreements in the United States do make provision for arbitration.
- 28/ Woods, supra, n. 24, p. 238.
- 29/ See generally, Woods (ed.), "A Critical Appraisal of Compulsory Conciliation in Canada", Industrial Conflict and Dispute Settlement, Montreal: Quality Press, 1955. pp. 96-111. Philips, "Government Conciliation in Labour Disputes: Some Recent Experience in Ontario", in Kovacs, supra, n. 3 at p. 218. Carrothers, supra, n. 4. pp. 302-309; and Jamieson, supra, n. 4, at pp. 118-121.
- 30/ Carrothers, supra, n. 3, p. 304.
- 31/ Joint Submission, Trades and Labour Congress of Canada on Canada's Economic Prospects, Ottawa: Mutual Press, 1956, p. 38.
- 32/ Jamieson, supra, n. 4, p. 119.
- 33/ Arthur M. Ross, "The National History of the Strike", Ch. 2 in Kornhauser, Dubin & Ross (eds.), Industrial Conflict, New York: McGraw-Hill, 1954, p. 36.
- 34/ Professor Woods in "Canadian Collective Bargaining and Dispute Settlement Policy: An Appraisal", in Kovacs, supra, n. 3 at p. 238 appears to corroborate these hypotheses:

Negotiation disputes differ from the other three [rights disputes, jurisdictional disputes and recognition disputes] in that standards upon which to judge the issues have not usually been established either by the parties themselves or by the legislative authorities. The reason for the apparent anomaly is to be found in the nature of the bargaining disputes themselves. In an enterprise economy based on liberal pluralistic principles there are no universal standards for the settlement of issues involving such matters as wages hours, the appropriate number of holidays with pay, the length and frequency of industrial rest periods, sickness benefits, bereavement leave, and the multitude of other large and small issues which form the substance of industrial controversy.

- 35/ Ante, p. 191.

- 36/ Ante, p. 81.
- 37/ McGarvie, "Principle and Practice In Commonwealth Industrial Arbitration After Sixty Years", 1 Fed. L. Rev., p. 68.
- 38/ Derber, "The Principles of Dispute Settlement" in Problems and Policies of Dispute Settlement and Wage Stabilization During World War II, Bulletin No. 1009 of The United States Department of Labor, p. 84.
- 39/ Phelps, "Compulsory Arbitration: Some Perspectives," Industrial and Labor Relations Review, Vol. XVIII, 1964, p. 81.
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- 40/ Ibid. p. 91.
- 41/ McPherson, "Tripartitism" in Problems and Policies of Dispute Settlement and Wage Stabilization During World War II, Bulletin No. 1009, United States Department of Labor, p. 266.
- 42/ McNatt, "Problems of Case Processing", supra, n. 41 at p. 334.
- 43/ Ante, p. 221.
- 44/ Stevens, "Is Compulsory Arbitration Compatible with Bargaining?", Vol. 5, Industrial Relations at p. 48, where he says:

If compulsory arbitration of this kind is to be consonant with and is to encourage collective bargaining, the principles upon which the awards are based must be such that the parties have appropriately divergent expectations about the award and/or appropriate uncertainty with respect to it. A simple principle (e.g., that awards shall follow a cost-of-living index, or that awards shall follow other settlements which are identified) will tend to lead the parties to the same expectations about the outcome. Hence, however meritorious such principles might be on some grounds, they would not be well contrived from the point of view of compatibility with collective bargaining.
- 45/ Ibid. at p. 48.
- 46/ Ibid. at pp. 49-50.
- 47/ Stevens, supra, n. 44, at pp. 48 & 49 points out that the adjudication model has a further flaw. It purports to produce a "right" answer whereas, "in the context of an industrial relations system such as our own, an arbitration institution designed to serve, say a national wages policy (rather than merely to preclude stoppage) may well appear to the parties to represent a perversion of the proper function of arbitration".
- 48/ For example see Bernard Wilson, "Some Random Observations on Labour Relations Today", mimeo notes presented to the Canadian Bar Association, September 12, 1967, where he comments as follows:

In some cases, utterly original and impracticable legislative schemes or gimmicks are suggested for the solution of labour problems. The proposal was designed to force would-be strikes to remain at work without a wage increase while impounding the profits of the employer, but nothing was said about disputes where wage rates were not at issue where there were no profits. In another scheme it was suggested that an arbitrator be given authority to make an award in a dispute without hearing the parties, on the basis of an absolute choice between the latest bargaining positions of the parties. There could be no compromise; the award would be all or nothing at all. Whatever marks are given for originality here, it is difficult to visualize one hundred thousand railwaymen their ardent desire for a wage increase to such a sporting method of settlement — or accepting an adverse award in a sporting way."

- 49/ Stevens, supra, n. 44 at p. 50, n. 28, points out that "Generally speaking, both labour and management organizations are strongly opposed to compulsory arbitration in any form. The issue raised here however, is that of relative acceptability, i.e., is the compulsory arbitration system herein outlined apt to be more or less acceptable than some other compulsory arbitration system?"
- 50/ Ibid. p. 51.
- 51/ Other shortcomings include the possibility of a "perverse" award. This could be counteracted, however, through the use of an appeal to "show cause" why the award should not be implemented. This appeal could be either to an agency operating in the labour relations field or to the Minister or Deputy-Minister of Labour.
- 52/ Chamberlain, The Labor Sector, New York: McGraw-Hill, 1965 at p. 641.

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APPENDIX

ARBITRAGE DES CONFLITS D'INTERETS

RESUME

La présente étude a pour objet "l'arbitrage des conflits d'intérêts", c'est-à-dire, la procédure de décision par un tiers qui détermine les modalités d'emploi applicables à une période de temps à venir et, en particulier, l'examen de la possibilité de l'utiliser sous une forme ou sous une autre dans les relations du travail au Canada.

Dans le Chapitre I, nous cherchons à analyser d'une manière abstraite et théorique, "l'arbitrage des conflits d'intérêts" et son incidence sur la "négociation collective". Les Chapitres II et III présentent des descriptions empiriques du fonctionnement de "l'arbitrage des conflits d'intérêts" à Singapour et en Australie. Le Chapitre IV, s'inspirant de sources secondaires, donne un aperçu du fonctionnement de cette institution en Amérique du Nord. Le Chapitre V décrit d'abord le climat des relations du travail au Canada, puis il passe brièvement en revue ce qui se fait à l'étranger à cet égard pour offrir à la fin quelques opinions touchant les formules et les limites d'utilisation de cette méthode dans notre pays.

CHAPITRE I

On y trouve une définition de "l'arbitrage des conflits d'intérêts", puis une analyse de l'arbitrage en tant que forme de jugement; voici les idées qu'on y développe ensuite:

1. Le jugement en tant que processus de décision est caractérisé par le mode de participation dont disposent les parties intéressées à la décision. Ce mode de participation s'appuie sur des éléments de preuve pertinents et des exposés motivés.

2. Pour que la participation soit féconde, les parties intéressées doivent être en mesure d'établir certains principes ou critères de décision sur lesquels elles fondent leurs arguments et auxquels elles rattachent leurs affirmations.

3. Les problèmes qui, par leur nature, comportent un certain nombre de sous-questions reliées entre elles et qui, partant, offrent une multiplicité de combinaisons possibles dépassent la capacité humaine de ramener de façon rationnelle toutes les implications et les relations possibles à un genre de réponse "vrai" ou "faux".

4. Plus forte sera la "polycentricité" d'une tâche ou d'un problème donné, plus il sera difficile d'arriver à une solution par des exposés motivés.

5. Plus vaste sera la "polycentricité" d'une tâche donnée, moins la participation féconde sera appuyée sur la présentation d'exposés motivés et de preuves pertinentes.

6. Plus étendue sera la "polycentricité" d'une tâche donnée, moins les critères de décision sauront fournir une base efficace aux exposés motivés.

Nous analysons ensuite la "tâche" ou "l'objet" en vue d'en déterminer le degré de "polycentricité"; nous arrivons ainsi à conclure que l'établissement des modalités qui se retrouvent dans la plupart des conventions

collectives constitue une tâche marquée d'un degré élevé de polycentricité. Un examen des critères jugés aptes à résoudre les conflits d'intérêts vient corroborer cette constatation. Finalement nous constatons que le jugement en tant que processus de décision se prête mal à la solution des conflits d'intérêts.

La dernière partie du Chapitre I étudie la négociation collective, et en particulier l'influence de l'arbitrage sur la négociation antérieure. On passe en revue trois modèles d'arbitrage: le modèle adjudicatif, l'arbitrage tripartite non adjudicatif et le modèle de l'alternative; voici les conclusions provisoires que nous proposons:

1. Il serait difficile de trouver un régime d'arbitrage fonctionnant à la façon d'une variante séquentielle de négociations collectives qui permettrait une participation féconde des parties intéressées soit au moyen de preuves et d'exposés motivés, comme dans le modèle adjudicatif, soit par voie d'arbitrage tripartite non adjudicatif. La formule adjudicative d'arbitrage ne s'applique qu'à quelques situations isolées et, même dans ces cas, la négociation sera supplantée par autre chose. Toutefois, lorsqu'on réussira à l'utiliser, on peut s'attendre à ce que la participation par voie de preuves et d'exposés motivés soit considérable.

2. L'arbitrage tripartite n'est pas satisfaisant parce qu'il remet entre les mains de l'organisme arbitral le mode le plus important de participation par la négociation. Toute situation où un compromis s'offre à l'autorité arbitrale contribuera à affaiblir l'efficacité des négociations collectives. De plus, lorsque les circonstances ne se prêtent pas à une décision adjudicative, il est peu utile de recourir à une audition en vue de fournir aux parties l'occasion de participer réellement au processus de décision.

3. C'est quand le processus même d'arbitrage est défectueux qu'augmente la nécessité d'accorder aux parties une influence véritable et une participation à la décision par voie de négociation. La forme de décision la plus susceptible d'offrir le climat de choix opposés, qui est essentiel à la négociation, est celle où le tiers décisionnaire doit se ranger d'un côté ou de l'autre. On peut trouver que c'est un processus de décision arbitraire, mais c'est aussi un moyen très efficace d'assurer l'intégrité des négociations.

CHAPITRE II

Singapour a adopté en 1961 le modèle d'arbitrage tripartite non adjudicatif; nous analysons cette expérience au cours du Chapitre II.

En 1960 le gouvernement du People's Action Party (P.A.P.) passait l'Industrial Relations Ordinance, loi destinée à établir un cadre de négociation collective, de même que l'appareil d'arbitrage des conflits d'intérêts dans des situations où aucune entente n'était possible. Néanmoins, le tribunal ne devait pas se substituer à la négociation; on espérait que ces dispositions réduiraient les différends du travail et favoriseraient des relations stables et pacifiques. Le succès a été remarquable. On n'a fait appel aux cours de justice qu'en de rares occasions; les négociations collectives ont servi de base au règlement des différends et, lorsque la justice a dû entrer en jeu, ses jugements ont été généralement bien reçus des parties en cause à l'exception des syndicalistes du secteur public.

a) La procédure d'arbitrage

La participation des parties lors des auditions mêmes ne semble guère importante. Aux yeux de l'avocat expérimenté, la présentation des témoignages

ne constitue pas un mode efficace de participation au processus de décision. Ces auditions, en plus d'être des occasions de propagande, servent bien des fois à fournir aux représentants des parties qui sont membres de la commission judiciaire des documents et des exposés à utiliser lors des réunions subséquentes à l'audition. De plus, on y a souvent recours pour indiquer des compromis acceptables qui exercent par la suite une influence considérable.

Le processus de décision n'est pas de nature déclaratoire même si l'amalgame de l'arbitrage et le règlement amical de conflits d'intérêts a eu tendance à embrouiller les deux questions de l'élargissement et de l'utilisation des critères de décision. Les tribunaux ont souligné que les précédents ne s'appliquaient pas à l'arbitrage; on en est arrivé à des critères assez précis. Toutefois, ceux qui ont le plus de chance d'être acceptés apparaissent dans les Ordonnances ou dans les conventions et les sentences arbitrales. Il n'est pas possible d'expliquer en détail certains critères de décision tels que la "comparabilité" ou "les besoins des travailleurs". De même dans le domaine des salaires et des primes il existe une marge considérable d'hésitation quant aux bénéfices à accorder; cependant, cet élément perd de l'importance par suite de l'adoption récente d'une politique générale de restriction.

Cette hésitation est compréhensible si l'on considère la nature du conflit et si l'on se rend compte que le processus de décision est de caractère tripartite. Les représentants se conduisent avant tout à la façon de négociateurs et le processus de décision est une forme de négociation collective. En général, quand on y a eu recours, les jugements des tribunaux ont été bien accueillis et ils sont admis dans les relations du travail de Singapour.

C'est un processus peu commode et très lent; les formalités excessives des audiences, la masse d'information qu'il faut présenter font que peu de syndicalistes et de négociateurs patronaux aiment à comparaître devant ce tribunal, surtout si le différend porte sur un éventail assez complet de points litigieux. Ainsi, comme nous l'avons indiqué, le processus a exigé, dans ses modes d'application, des "frais d'arbitrage" importants qui semblent être devenus "des prix de désaccord" suffisant à créer des équilibres de choix opposés nécessaires à des négociations collectives sérieuses. Il ne serait pas injuste de dire que les "frais d'arbitrage" ont réduit l'importance des menaces d'intervention qui constituaient auparavant l'élément principal de coercition ou d'opposition dans les négociations. Le recours à la grève a diminué de façon considérable. Le gouvernement, en conformité de la politique qu'il poursuit de présenter aux investisseurs étrangers l'assurance de relations du travail stables, a essayé de contrecarrer les mouvements de grève. En outre, un taux élevé d'embauche et une situation économique menaçante donnent plus de prix aux emplois et personne ne veut risquer d'être mis à pied.

b) L'arbitrage et la négociation collective

La pratique et la statistique établissent le fait que même si l'arbitrage est utilisable et utilisé, il n'en a pas pour autant sérieusement touché ni supplanté la négociation collective. Il est vrai que les rapports de force en sont changés au bénéfice de la plupart des syndicats et que les sentences du tribunal influent sur l'aboutissement des négociations, mais le processus de la négociation semble fondamentalement le même. Les mécanismes établis ont suffi à créer des équilibres de choix opposés qui, la plupart du temps, ont réussi à provoquer des réactions transactionnelles

ouvertes à des compromis et à des concessions. En général, et à quelques exceptions près, la négociation présente un caractère semblable au modèle de Stevens. Il y a tendance à accorder plus d'importance et à recourir plus fréquemment aux tactiques de persuasion et d'appel aux sentences arbitrales. Toutefois, aux méthodes de coercition, on mêle de fréquentes mentions d'arbitrage, d'ajournement, de recours aux interventions industrielles et d'appels au ministre du Travail. L'inscription d'une cause en arbitrage a sensiblement le même effet que de fixer la date limite d'une grève et la possibilité de demandes de sursis permet un accès unilatéral aux tribunaux et renforce ces dispositions.

En plus de ces mécanismes établis qui favorisent la négociation collective, on retrouve l'action d'influences extérieures. Non seulement il existe cette tendance générale à vouloir régler soi-même ces problèmes par la négociation collective, mais encore le tribunal y travaille activement. En bien des occasions le tribunal s'est prononcé en ce sens et a demandé aux plaignants de poursuivre leurs négociations. En dernier lieu, la position unique qu'occupe le ministère du Travail et l'influence occulte qu'exercent ses médiateurs poussent les parties à s'entendre.

Ainsi, à Singapour, le prix élevé qu'exige l'inscription des causes d'arbitrage, prix que doit payer le syndicat qui obtient rarement la rétro-activité complète, les délais prolongés et les séparations qu'ils entraînent, la sempiternelle incertitude touchant les questions monétaires ainsi que l'encouragement officiel donné à la négociation plutôt qu'à l'arbitrage, tout cela a contribué à maintenir un climat favorable aux ententes collectives.

CHAPITRE III

Le régime d'arbitrage fédéral en Australie fournit quelques indications sur le fonctionnement de l'arbitrage adjudicatif. De façon générale, celui-ci tend à confirmer que "les conflits d'intérêts" ne se règlent pas par un simple jugement déclaratoire.

a) Le processus arbitral

L'histoire de l'arbitrage en Australie nous éclaire sur le fonctionnement d'un processus surtout façonné selon un modèle adjudicatif. Au moins dans les causes nationales d'ordre économique, la participation des parties à l'élaboration des décisions sous forme d'exposés et de présentation de preuves passait en général pour peu utile. Il n'existe aucun critère identifiable auquel on puisse rattacher l'exposé de façon rigoureuse et rationnelle. Les éléments qui entrent dans la décision sont nombreux et de nature plutôt nébuleuse. Et, comme l'observe Higgins, il faut, à titre de mesure fondamentale de tout le processus, que la Commission de conciliation et d'arbitrage du Commonwealth (Commonwealth Conciliation and Arbitration Commission) fasse connaître ses prévisions des conditions économiques à venir. De plus, on reconnaît généralement que certaines interventions extérieures telles que des manifestations d'activisme de la part des syndicats et des cris d'alarme lancés par des chefs d'entreprise exercent une influence considérable sur la Commission. Toutes les personnes intéressées sont d'avis que l'attitude du représentant du Commonwealth revêt une extrême importance. Enfin, le caractère multiple de la Commission dans des causes de ce genre et la conviction que l'unanimité rend les décisions plus acceptables, contribuent encore à réduire l'efficacité des exposés des parties.

On a exprimé des vues à peu près semblables en ce qui a trait aux décisions du tribunal siégeant à plein banc touchant les normes de valeur et les rapports relatifs fondamentaux du travail. Il paraît évident qu'il faudra un jugement ouvert et dégagé pour préparer des bases nouvelles de distinction entre les différents métiers. Dans ces circonstances, l'argumentation et les témoignages des parties n'ont guère d'effet. Il n'y a pas de doute que la participation des parties a porté davantage dans des causes particulières auprès des commissaires non-juristes surtout lorsqu'on pouvait avoir recours à certaines normes de comparaison; mais, même alors, l'application de ces normes présentait de telles difficultés qu'elle laissait grandement à désirer. Parce que le tribunal au complet n'a pas remis à jour, depuis plusieurs années, son estimation de la valeur fondamentale du travail, les commissaires non-juristes ont commencé récemment à faire diverses concessions, ajoutant ainsi à la confusion et détruisant le reste d'objectivité que pouvait avoir le système.

L'habitude générale qu'ont les syndicats et, jusqu'à un certain point, les employeurs d'appuyer leur cause sur des campagnes de publicité vient corroborer cette conviction que, dans les conflits nationaux d'ordre économique et dans les audiences du tribunal siégeant à plein banc, la présentation d'exposés motivés et de témoignages n'est guère efficace. Souvent les syndicats ont recours à des réunions d'étude avec arrêt de travail d'un bout à l'autre du pays en vue de faire savoir à la Commission qu'on ne prend pas ses décisions à la légère. De fait, on a parfois observé qu'un arrêt de travail d'un jour valait mieux que cent journées de discussion.

La prédominance de plus en plus répandue de la suradjudication appuie la constatation que le problème de la détermination des salaires à l'échelle

nationale offre des aspects "polycentriques". Elle soutient l'avis que nous exprimons ici, à savoir qu'il est impossible d'assujettir les salaires et les modalités d'emploi à un régime rigide offrant des réponses bien tranchées.

b) L'arbitrage et la négociation collective

L'expérience australienne nous en apprend beaucoup moins sur la question de la compatibilité qui peut exister entre la négociation collective et les décisions rendues par un tiers. L'arbitrage a toujours été accepté comme le moyen principal de régler les conflits d'intérêts; en conséquence, le recours à la négociation collective n'a été que parcellaire, et encore, lorsqu'on s'en est servi, a-t-il été fortement influencé par le régime d'arbitrage. Il existe bien aujourd'hui une tendance croissante à régler directement les différends plutôt qu'à en appeler à la Commission de conciliation et d'arbitrage du Commonwealth; mais la tradition, les difficultés d'organisation ainsi que l'absence d'un personnel intéressé et compétent en retardent la généralisation.

Dans le contexte australien, nous avons observé un mode de négociation qui touche la question de l'arbitrage en tant que variante séquentielle aux négociations collectives; les parties négocient selon les règles prévues et un commissaire non-juriste assiste à toutes les séances, prêt à servir d'arbitre au besoin. A cet égard, nous avons relevé deux situations générales. Dans un cas, les patrons dirigeaient les négociations salariales et ils utilisaient cet avantage en vue d'en arriver à une entente définitive sur les versements de suradjudication et sur les méthodes de règlement du conflit. Les négociations devenaient du boulwarisme. Les syndicats se retrouvaient acculés à une position où le recours à une grève ou à l'arbitrage leur ferait perdre en toute probabilité des priviléges dont ils jouissaient déjà. De

fait, c'était à prendre ou à laisser et ils ne pouvaient faire rien d'autre que d'accepter. L'autre cas n'était pas aussi bien conditionné; il y restait place pour une certaine négociation. Il est difficile d'établir jusqu'à quel point ces situations sont généralisées. Les données statistiques officielles ne se prêtent pas à la divulgation totale ou partielle des décisions de la Commission. Toutefois, dans les causes que nous avons étudiées, nous avons relevé des preuves de choix opposés et de négociations. En général, le prix de l'arbitrage est fondé sur la durée de l'instance et sur les montants qu'un commissaire peut déterminer sous forme de marges différencielles ou d'indemnité industrielle. Quand ces montants sont importants, il semble y avoir un désir réel de négocier. Néanmoins, dans bien des cas, les critères laissaient entrevoir assez clairement ce que serait la sentence arbitrale et l'on arrivait à s'entendre sur ces questions parce que, on s'en rendait compte à l'avance, l'arbitrage serait peu profitable. Parfois, la possibilité d'une grève ajoute une autre dimension au "prix du désaccord"; il se peut que cette menace ait quelquefois favorisé un climat de négociation, bien plus que le prix et l'incertitude du résultat de l'arbitrage.

CHAPITRE IV

Dans ce chapitre, nous utilisons des sources secondaires en vue d'étudier l'arbitrage en Amérique du Nord.

1. Le National War Labor Board (N.W.L.B.)

L'histoire du War Labor Board fournit un certain nombre d'aperçus utiles, mais il faut se rappeler que cette commission fonctionnait dans des circonstances extraordinaires, à un moment où presque tout le monde contribuait à l'effort de guerre et où toutes les classes de la société américaine

consentaient volontiers à faire quelques sacrifices pour la cause commune. Cependant, c'est un exemple concret d'une forme d'arbitrage d'intérêts qui apporte, en plus, certaines indications quant à l'influence que cette commission a exercée sur les négociations pré-arbitrales.

Cette commission ne cherchait pas à imposer de sentences. Ses délibérations étaient ouvertement tripartites; pour en arriver à une décision, elle avait recours aux négociations arbitrales, tout en conservant l'autorité ultime de régler le différend. L'audition d'une affaire ne constituait pas une véritable participation au processus de décision; comme on l'a déjà dit, elle ne donnait en réalité que la satisfaction psychologique d'une juste forme de procès. La véritable participation au règlement des litiges consistait à présenter des exposés motivés demandant l'application de critères de décision reconnus.

De fait, sur la question des "critères", du moins en ce qui a trait aux problèmes salariaux, on n'a jamais pu trouver une formule satisfaisante. Sur d'autres points, tels que la sécurité syndicale, on a réussi à établir des critères et, dans ces cas, le processus de décision prenait un caractère adjudicatif. Toutefois, ceux qui commentent les critères que la commission a établis mentionnent toujours la "polycentricité" de la détermination des salaires et la nature transactionnelle des conventions collectives, deux sujets qui semblent être à la base de leurs principales critiques. Il faut se rappeler que les repères qu'on s'était fixés visaient à servir d'éléments de "stabilisation".

Le caractère tripartite de la commission en fait manifestement un organisme de négociation et la description qu'en font ceux qui ont participé à

ses travaux évoque une ressemblance frappante avec le tribunal d'arbitrage du travail qu'on a créé à Singapour; les rapports concluent qu'elle fonctionne bien.

Quant aux effets de l'arbitrage sur la négociation collective, ils restent ambigus. Certes l'un n'a pas remplacé l'autre. De fait, on serait tenté de dire que la négociation reste en grande partie le fondement des relations entre employeurs et employés. Néanmoins, l'arbitrage a changé la nature des éléments sur lesquels s'appuient la négociation. Il semblerait pourtant que la commission tripartite a réussi à antagoniser les parties dans la plupart des cas. Le régime offre une faiblesse évidente en ce que la commission a tendance à garder le dernier mot, ce qui réduit d'autant la liberté de négociation. Il est probablement juste de dire que la fonction stabilisatrice de la commission a nui de façon très considérable au succès des négociations.

2. Etude du fonctionnement concret de l'arbitrage aux Etats-Unis

A cet égard, l'histoire officielle reste fragmentaire et peu documentée. Les préjugés transparaissent souvent dans les commentaires des observateurs. On ne peut donc en arriver à des conclusions solides, sauf pour ce qui est de l'apparente unanimité que l'on rencontre quand il s'agit de l'application des normes. Celles qu'a établies la loi ne se sont pas révélées satisfaisantes dans la pratique et les commentateurs ont tendance à croire qu'on ne réussira pas à en trouver d'autres qui le seront.

Quant à l'effet qu'a eu l'arbitrage sur la négociation, il est clair qu'il a été plutôt négatif: il a affaibli les forces traditionnelles qui tendaient à imposer un règlement. Sans aucun doute, il y a eu des cas où

la réglementation des salaires et le désir d'éviter les responsabilités faisaient de la négociation pré-arbitrale de simples formalités; toutefois, en l'absence de statistiques et d'autres données plus précises, il est impossible d'en arriver à des conclusions définitives en ce qui a trait à l'influence de ce genre d'arbitrage.

3. L'arbitrage chez les travailleurs
d'hôpitaux de l'Ontario

Pour un certain nombre de raisons, il faudra accepter avec réserve toute déduction faite d'après l'application du Hospital Labour Disputes Arbitration Act (1965) de l'Ontario. C'est surtout qu'il s'agit d'une loi vieille d'à peine deux ans et qu'il est encore trop tôt pour prendre à son égard des positions définitives. Cette brève période d'essai pourrait bien laisser présager un avenir qui ne serait pas le vrai, parce qu'on connaît mal encore de façon générale le fonctionnement de ce régime d'arbitrage. Quand on l'aura étudié davantage, il est possible qu'on hésite moins à recourir à l'arbitrage. D'autre part, le fait qu'on n'ait eu recours une deuxième fois à l'arbitrage que dans 20 pour cent des cas semblerait indiquer un tout autre point de vue. De plus, au cours de la période en cause il est probable que les conditions de travail et les salaires des travailleurs d'hôpitaux se seraient améliorés sans qu'il y ait eu besoin d'avoir recours à la négociation ou à l'arbitrage. Survienne un ralentissement de cette tendance et il se pourrait bien que les dispositions changent vis-à-vis du recours à l'arbitrage.

CHAPITRE V

Dans le Chapitre V nous cherchons à déterminer les formes et les limites du recours à l'arbitrage des conflits d'intérêts au Canada et nous en arrivons à la conclusion suivante:

Le caractère compliqué et les imperfections inhérentes des modèles d'arbitrage décrits ci-dessus demandent qu'on ne les utilise qu'avec prudence. Outre cela, le contexte particulier des relations du travail au Canada semblerait restreindre assez sérieusement le rôle de l'arbitrage obligatoire en ce moment. Toutefois, certaines situations peuvent exiger l'interdiction des grèves; le seul autre recours serait alors l'arbitrage. De plus, il ne paraît y avoir aucune raison pour qu'il n'existe pas une sorte d'appareil de recours volontaire.

a) Régime complet d'arbitrage des conflits d'intérêts propre à diverses industries

Il se trouve des conflits entre employeurs et travailleurs où l'usage du droit de grève peut imposer des peines excessives à l'entourage social. La police, les pompiers et les services hospitaliers en sont des exemples évidents. La Fonction publique est moins "menaçante", mais on pourrait juger qu'on devrait lui fournir un régime obligatoire complet d'où serait banni tout recours à des sanctions d'ordre économique. La décision même d'avoir recours à l'arbitrage exige l'examen approfondi d'un certain nombre de variables qui dépasseraient le cadre de notre rapport. Nous allons nous arrêter ici à une formule optimum de recours à un régime complet d'arbitrage obligatoire des conflits d'intérêts.

Le fait que le régime s'appliquerait à l'ensemble de l'industrie rend impossible l'utilisation du modèle de l'alternative. Il se ferait des comparaisons naturelles et tout modèle de ce genre entraînerait des différences qui seraient trop marquées pour être acceptables. D'autre part, un modèle adjudicatif ne serait possible que s'il présentait des chances d'utilisation de normes claires de "comparabilité". En pareil cas, il prendrait la place

de la négociation collective. A tout événement, le jugement serait rarement approprié et, par conséquent, en procédant par élimination, ce serait la forme générale du modèle tripartite non adjudicatif qui serait la plus satisfaisante.

Elle offre l'avantage de ne pas éliminer complètement la négociation, surtout si personne ne cherche à appliquer avec rigueur les critères de décision. L'idéal consisterait à spécifier une "norme" exempte de valeur telle que "l'équité et la bonne conscience" et à déterminer que les sentences prendront la forme d'un énoncé des conditions de travail sans fournir de motifs. L'audition jouera un rôle psychologique; elle augmentera le prix de l'arbitrage mais on ne devrait pas compter sur elle pour permettre une participation un tant soit peu utile au processus de décision. Evidemment, il faudra restreindre les grèves et accorder l'accès à l'autorité arbitrale à la demande de l'une des parties.

Si l'arbitre neutre est habile, s'il ne se laisse pas aller à assumer l'initiative, et si les membres délégués travaillent en étroite collaboration avec les parties, les négociations qui constituent le mode de participation accordé aux contestants devraient progresser sans à-coups sérieux.

Les membres neutres peuvent siéger de façon permanente ou être choisis à chaque cause. Dans ce dernier cas, l'incertitude de la sentence sera plus grande, ce qui tend à favoriser le progrès des négociations. D'autre part, on peut juger qu'un membre neutre permanent ou un groupe de membres neutres contribuent à assurer une certaine continuité. La justesse de ce point de vue est fonction du secteur particulier en cause; ainsi la loi sur les hôpitaux de l'Ontario a établi un processus cause par cause, tandis que pour la Fonction publique fédérale on a créé un tribunal permanent.

b) L'arbitrage obligatoire cause par cause

Dans le cas de conflits à régler d'urgence, le gouvernement peut avoir recours à "l'arbitrage" obligatoire cause par cause soit comme seul moyen, soit comme un ensemble de moyens. C'est dans ce contexte qu'il faut considérer le recours au modèle d'arbitrage de l'alternative. Ce dernier se prête fort bien à encourager la négociation et il cadrerait dans une stratégie générale qu'adopterait le gouvernement de recourir à des lois particulières ou à un ensemble de moyens en vue de créer une sorte de pression par la menace d'arbitrage.

L'objection qu'on fait aux syndicats de toujours obtenir quelque chose n'aurait guère prise dans ce contexte. Le danger d'en arriver à un résultat négatif est contrebalancé par la possibilité d'en appeler soit à un haut fonctionnaire, soit à un autre tribunal de relations du travail en vue de faire valoir pourquoi le règlement ne devrait pas être mis en vigueur; l'effet "d'artifice" ou de "truc" de ce processus serait amoindri si on avait recours à un modèle tripartite et à une audition pré-arbitrale. Dans ce cas, il importerait encore davantage d'assurer que les membres délégués du groupe de négociation soient raisonnablement rapprochés de leurs commettants.

La formule de l'alternative sera d'autant plus efficace qu'on aura demandé au membre neutre de ne préparer aucune sentence et de se borner à choisir entre les propositions définitives des deux représentants des parties. Il serait aussi souhaitable de trouver un mécanisme en vertu duquel on pourrait établir des échéances à l'intérieur du processus de décision tripartite.

c) L'arbitrage volontaire des conflits d'intérêts

Comme nous l'avons déjà dit, on n'a rien à perdre à établir un mécanisme d'arbitrage qu'on pourrait utiliser si les parties s'entendaient pour ne pas

recourir aux grèves et lock-out et pour accepter à titre définitif une décision arbitrale. Une loi de ce genre pourrait servir à deux fins reliées à l'arbitrage obligatoire. En premier lieu, on pourrait y recourir comme à un ensemble de moyens ou comme à un moyen particulier. Rédigée sous forme de loi, cette formule constituerait une menace plus sérieuse. En deuxième lieu, elle fournirait une excellente occasion de nous familiariser avec le modèle de l'alternative.

A cet égard, répétons que la formule tripartite décrite plus haut serait plus facile à utiliser parce que le caractère volontaire qu'elle offre aurait tendance à réduire l'allure de pérennité de cet appareil.

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